

NORTH CAROLINA
COURT OF APPEALS
REPORTS

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261 N.C. APP.

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CASES
ARGUED AND DETERMINED IN THE
COURT OF APPEALS
OF
NORTH CAROLINA
AT
RALEIGH

PATRICIA M. BRADY, PLAINTIFF

v.

BRYANT C. VAN VLAANDEREN; RENEE M. VAN VLAANDEREN;
MARC S. TOWNSEND; LINDA M. TOWNSEND; UNITED TOOL
& STAMPING COMPANY OF NORTH CAROLINA, INC.; UNITED REALTY
OF NORTH CAROLINA, LLC; ENTERPRISE REALTY, LLC; AND
WATERS EDGE TOWN APARTMENTS, LLC, DEFENDANTS

No. COA18-61

Filed 21 August 2018

Corporations—judicial dissolution—rights and interest of minority shareholder

In a complex business case arising from plaintiff's termination from her family's business, the trial court did not abuse its discretion by declining to order the dissolution of the business where plaintiff failed to forecast evidence that the company was deadlocked, unprofitable, or mismanaged pursuant to N.C.G.S. § 55-14-30. Even assuming plaintiff had a reasonable expectation to receive a salary and benefits regardless of whether she performed any work for the company, the evidence showed that plaintiff received substantial dividends from her company stock, that dissolution would harm the rights and interests of other shareholders, and that nothing precluded plaintiff from selling her interest in the company.

Appeal by plaintiff from order and opinion entered 25 July 2016 by Business Court Judge James L. Gale in Cumberland County Superior Court. Heard in the Court of Appeals 9 August 2018.

BRADY v. VAN VLAANDEREN

[261 N.C. App. 1 (2018)]

Bain & McRae, LLP, by Edgar R. Bain and Ryan McKaig, for plaintiff-appellant.

Shanahan McDougal, PLLC, by Kieran J. Shanahan, Brandon S. Neuman and Jeffrey M. Kelly, for defendants-appellees.

TYSON, Judge.

Patricia M. Brady (“Plaintiff”) appeals from the Business Court order granting summary judgment in favor of Defendants. We affirm.

I. Background

United Tool & Stamping Company of North Carolina, Inc. (“United Tool”) is a metal stamping business located in Fayetteville. In June 1996, United Tool was incorporated in North Carolina. Anthony Moschella, Plaintiff’s father, served as President. Day-to-day management was handled by Plaintiff’s brothers-in-law, Defendants Bryant Van Vlaanderen and Marc Townsend.

In December 1996, United Tool amended its articles of incorporation and created two classes of stock: 100 shares of Voting Common stock and 900 shares of Non-Voting Common stock. The Non-Voting stock provided for pro-rata participation in any dividends declared by United Tool, but contained no voting rights. The Non-Voting stock was divided equally among three of Moschella’s daughters—Plaintiff and Defendants Linda Townsend and Renee Van Vlaanderen—and their husbands, with each taking a one-sixth interest. As part of her divorce settlement from her first husband in 2002, Plaintiff acquired his shares. Anthony Moschella retained all of United Tool’s Voting Common stock.

Plaintiff was initially employed by United Tool in 2001 and was paid a weekly salary to work in the offices and assist with administrative tasks. Plaintiff worked for United Tool until May 2005. She stopped going in to work once her second husband, Tim Brady, was employed at United Tool. Moschella terminated Plaintiff’s employment and medical insurance on 31 May 2005. Plaintiff continued to receive her pro-rata share of United Tool’s dividend distributions, but received no salary or other benefits.

In March 2007, Moschella approved Plaintiff’s rehiring at United Tool. Defendants Renee Van Vlaanderen and Linda Townsend were also hired to work at United Tool at that time. In 2008, Plaintiff became “pretty sick” and was diagnosed with a variety of medical problems, including

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seizures. Plaintiff was absent from work for an extended period of time and did not come in to work regularly for years.

In December 2011, Moschella decided to sell his Voting Common stock to United Tool. On 2 January 2012, United Tool acquired all of Moschella's Voting Common stock. All shares of Non-Voting Common stock became Voting Common stock. Plaintiff and the individually named Defendants became the holders of Voting Common stock.

Tim Brady was fired from United Tool and Plaintiff's salary was increased. After this salary increase, Plaintiff became more involved, coming in to the office more frequently and participating in shareholder meetings. Plaintiff was told her salary and benefits were dependent upon her work with the company.

Plaintiff requested access to the corporate records of Defendants Enterprise Realty and United Realty. On 14 May 2012, Plaintiff's counsel sent a letter requesting a meeting where Plaintiff could review the corporate records. At the meeting on 24 May 2012, Plaintiff and her counsel inquired into Plaintiff's employment status and salary. Plaintiff's employment was terminated after the meeting on 24 May 2012.

Plaintiff filed a complaint on 24 August 2012. The case was designated as a complex business case by the Chief Justice of North Carolina on 4 September 2012. Defendants filed a motion to dismiss, which was partially granted on 1 August 2013. Both parties filed motions for summary judgment. After hearing oral arguments, the Business Court granted Defendants' motion for summary judgment on 25 July 2016. Plaintiff timely filed notice of appeal.

II. Jurisdiction

Appeal lies of right in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2013). This case was designated as a complex business case on 4 September 2012, prior to the effective date of the 2014 amendments designating a right of direct appeal from a final judgment of the Business Court to the Supreme Court of North Carolina. *See* 2014 N.C. Sess. Laws 621, ch. 102, § 1. This appeal is properly before us.

III. Issues

Plaintiff argues the Business Court erred by failing to apply the plain meaning of N.C. Gen. Stat. § 55-14-30, and by failing to order judicial dissolution. Plaintiff also argues the Business Court erred in considering equitable factors beyond the equities of the shareholders.

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[261 N.C. App. 1 (2018)]

IV. Standards of Review

“Our standard of review on appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that ‘there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’ ” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff’s case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003) (citation and internal quotation marks omitted), *aff’d per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

Judicial dissolution is a remedy that rests “within the trial court’s sound discretion.” *Royals v. Piedmont Elec. Repair Co.*, 137 N.C. App. 700, 704, 529 S.E.2d 515, 518 (2000). A finding that dissolution is not appropriate is reviewed for abuse of discretion. *Id.*

V. AnalysisA. Judicial Dissolution

To secure a decree of judicial dissolution a plaintiff must demonstrate:

(1) [s]he had one or more substantial reasonable expectations known or assumed by the other participants; (2) the expectation has been frustrated; (3) the frustration was without fault of the plaintiff and was in large part beyond [her] control; and (4) under all of the circumstances of the case, plaintiff is entitled to some form of equitable relief.

Meiselman v. Meiselman, 309 N.C. 279, 301, 307 S.E.2d 551, 564 (1983).

“When a minority shareholder . . . brings suit for involuntary dissolution or alternative relief, [s]he has the burden of proving that [her] ‘rights or interests’ as a shareholder are being contravened. Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 28.11 (7 ed. 2017). A plaintiff is not entitled to dissolution “at the expense of the corporation and without regard to the rights and interests of the other shareholders.” *Meiselman*, 309 N.C. at 297, 307 S.E.2d at 562 (emphasis

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supplied). A court possesses the authority to judicially dissolve a corporation when “liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder.” N.C. Gen. Stat. § 55-14-30(2) (2017).

Plaintiff argues the evidence tends to show she held “substantial reasonable expectations” to receive a salary and benefits, regardless of whether she performed services for United Tool. *See Meiselman*, 309 N.C. at 301, 307 S.E.2d at 564. Presuming Plaintiff did maintain such reasonable expectations, the Business Court concluded such expectation “does not justify the equitable remedy of a decree compelling judicial dissolution of United Tool.”

The record indicates United Tool continues to operate at a profit, and Plaintiff continues to receive “substantial dividends” as a shareholder. As such, Plaintiff’s evidence fails to forecast evidence tending to show or suggest United Tool’s management is deadlocked, the company is unprofitable, or its assets are being mismanaged, to support an order for dissolution. *See id.*

Plaintiff contends the Business Court incorrectly interpreted the plain meaning of N.C. Gen. Stat. § 55-14-30 and failed to recognize it had the authority to grant the relief she sought: to appoint a receiver and to sell the company. In its opinion and order the Business Court stated: “The Court need not consider whether it might award any alternative equitable remedy, because it does not have the power to do so.” The Court was responding to Plaintiff’s general comment that realistically she was not seeking a dissolution of United Tool, but prefers an alternative remedy, such as United Tool buying out her ownership interest.

The only equitable remedy a trial court may award is dissolution. N.C. Gen. Stat. § 55-14-30(2). A forced buyout of shares by the corporation could be triggered only if and after the court concludes judicial dissolution is an appropriate remedy. N.C. Gen. Stat. § 55-14-31(d) (2017). No equitable remedial powers allow a judge to compel Defendants to reinstate Plaintiff’s employment, as Plaintiff’s counsel conceded at oral argument. *See Coleman v. Coleman*, 2015 NCBC 110, 2015 WL 8539036, at *3 (citing *Robinson on North Carolina Corp. Law* § 28.11).

Plaintiff spoke at length about what may happen to the corporation *after* dissolution, claiming the court had failed to recognize its authority. This assertion is not supported by the record. Instead, the record shows the court found and concluded a decree of judicial dissolution was not justified because Plaintiff had received substantial dividends, and that dissolution would harm “the rights and interests of the other

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shareholders.” *Meiselman*, 309 N.C. at 297, 307 S.E.2d at 562. The court found in the exercise of its discretion that judicial dissolution of United Tool was not justified. Plaintiff’s assertions or forecasts of what may occur following a purported dissolution is immaterial.

Nothing in the record indicates Plaintiff is precluded from selling her shares or interest. There are no restrictions imposed upon Plaintiff to prevent her from selling her shares, and the individual Defendants reached an agreement allowing the disclosure of information to potential buyers.

Plaintiff failed to show the Business Court abused its discretion in declining to order judicial dissolution of United Tool in this case. Plaintiff’s arguments are overruled.

B. Additional Equitable Factors

Plaintiff argues the Business Court erred in considering the possible effects of dissolution on United Tool’s employees. Under the *Meiselman* standard, she asserts the court should have only considered the impact of dissolution upon the shareholders. *See Meiselman*, 309 N.C. at 297, 307 S.E.2d at 562. Plaintiff contends the issue of whether the trial court should consider equitable factors beyond the equities between and concerning the shareholders is a question of law to be reviewed *de novo*. There is little appellate guidance on what this Court should consider on appeal when reviewing the equities of judicial dissolution analysis.

Plaintiff continues to argue that her proposed remedy, the dissolution and sale of the entire company, would preserve the jobs of the employees, as whoever purchases the company would want to retain the employees to preserve the profits from United Tool. Further, Plaintiff contends the General Assembly and the Supreme Court of North Carolina only intended to protect the rights and interests of the minority shareholder, not to “provide job security for every employee of a company in which minority oppression is occurring.”

Defendants reject and counter this argument and analysis. They argue it is reasonable for the court to at least nominally consider key stakeholders in the dissolution determination in addition to the equities of the company and all shareholders. Defendants contend the proper application of *Meiselman* requires “the familiar balancing process and flexible remedial resources of courts of equity” in establishing its test for dissolution, considering whether “under all of the circumstances of the case plaintiff is entitled to some form of equitable relief.” *Meiselman*, 309 N.C. at 297, 301, 307 S.E.2d at 562, 564 (citation and internal quotation marks omitted).

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Defendants also cite to the Business Court's consideration of third parties in similar cases. The Business Court has considered, *inter alia*, the nature of the business, impacts on employees and others, the relationships between the parties, and recent corporate actions. *See Royals v. Piedmont Elec. Repair Co.*, 1999 NCBC 1, 1999 WL 33545516, at *6, *aff'd on other grounds*, 137 N.C. App. 700, 529 S.E.2d 515 (2000).

The Business Court's analytic framework in *Royals* cites to a Mississippi law journal article as persuasive authority, and has applied that consistent framework to many other cases when addressing *Meiselman* claims. *See* John Henegan, Comment, *Oppression of Minority Shareholders: A Proposed Model and Suggested Remedies*, 47 Miss. L.J. 476, 488-93 (1976); *see also Joalpe-Industria de Expositores, S.A. v. Alves*, 2015 NCBC 9A, 2015 WL 428333, at *8; *see also High Point Bank & Tr. Co. v. Sapona Mfg. Co.*, 2010 NCBC 11, 2010 WL 2507524, at *13, *aff'd on other grounds*, 212 N.C. App. 148, 713 S.E.2d 12 (2011).

Other long standing equitable and discretionary factors include: the party's clean hands, the adequacy of remedies at law, the person who seeks equity must do equity, and the avoidance of long-term entanglement of judicial resources. *See Creech v. Melnik*, 347 N.C. 520, 529, 495 S.E.2d 907, 913 (1998) ("One who seeks equity must do equity. The fundamental maxim, 'He who comes into equity must come with clean hands,' is a well-established foundation principle upon which the equity powers of the courts of North Carolina rest." (citation omitted)); *see also Moore v. Moore*, 297 N.C. 14, 16, 252 S.E.2d 735, 737 (1979) ("Equity seeks to reach and do complete justice where courts of law, through the inflexibility of their rules and want of power to adapt their judgments to the special circumstances of the case, are incompetent so to do." (citation and internal quotation marks omitted)).

Defendants also cite to this Court's prior treatment of the equitable balancing of third parties by the trial courts. In *Foster v. Foster Farms*, this Court concluded the trial court had "carefully weighed the consequences of each course of action it was authorized to take before deciding to liquidate the corporation." 112 N.C. App. 700, 711, 436 S.E.2d 843, 850 (1993). The trial court found and concluded liquidation was appropriate because ongoing operations would cause "stress on [the] families[.]" *Id.*

Further, in *Royals*, this Court considered the interests of a testamentary trust beneficiary and acknowledged "[t]he only way these shares will ever produce any money for her is if they are liquidated." 137 N.C. App. at 709, 529 S.E.2d at 521.

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Plaintiff requests this Court to independently address and answer this question, and not to rely upon business court cases and “law review articles from foreign jurisdictions.” Plaintiff contends that the “North Carolina model,” as embodied in *Meiselman* and its progeny, should focus *solely* on the shareholders, and not third parties. She asserts the only people possibly harmed by the dissolution of the company would be the individual Defendants, and they could avoid such harm by buying out her shares. Plaintiff’s argument on this issue relies upon her arguments in the previous issue. As noted, Plaintiff is free to sell her shares in a profitable and going concern, and is not under any restrictions to prevent her from doing so. Plaintiff has failed to show any abuse of discretion by the trial court in declining to order judicial dissolution.

VI. Conclusion

Under *de novo* review on summary judgment, this Court is empowered to further establish the legal analysis and considerations to guide the trial court’s decisions in judicial dissolutions. It is unnecessary for us to do so under these facts, as Plaintiff has failed to show any basis for us to conclude the Business Court abused its discretion in not ordering judicial dissolution of United Tool.

The court’s exercise of discretion and conclusion to decline dissolution is supported by the unrefuted evidence, even without considering the impact upon the employees and other third parties. The judgment appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Judges DIETZ and BERGER concur.

DAVIS v. RIZZO

[261 N.C. App. 9 (2018)]

REBECCA R. DAVIS AND MATTHEW M. DAVIS, INDIVIDUALLY AND ON BEHALF OF JEANETTE B. DAVIS, TRUSTOR OF THE JEANETTE B. DAVIS REVOCABLE TRUST DATED MARCH 11, 2002; AND MATTHEW M. DAVIS, ON BEHALF OF HIS CHILDREN, MALLORY FAY DAVIS AND MATTHEW McCABE DAVIS, JR., PLAINTIFFS

v.

JANET D. RIZZO, INDIVIDUALLY AND AS TRUSTEE OF THE JEANETTE B. DAVIS REVOCABLE TRUST DATED MARCH 11, 2002; ANNE PAGE WATSON; AND INTERVENOR JEANETTE B. DAVIS, DEFENDANTS

No. COA17-1153

Filed 21 August 2018

1. Civil Procedure—Rule 59—motion to amend—interlocutory order—validity of request

In an action challenging changes to a revocable trust based on allegations of undue influence, the Court of Appeals declined to exercise its discretion and treat plaintiffs' untimely appeal (from orders allowing a party to intervene, denying plaintiffs' motion to stay the proceedings, and granting defendants' motions to dismiss) as a writ of certiorari after determining that plaintiffs' motion to amend the trial court's orders did not adequately request valid Rule 59(e) relief. Plaintiffs' request for relief was not within the trial court's jurisdiction to grant where they asked for reconsideration of the interlocutory portion of the decision and not of the final judgment dismissing their claims, and reargued issues already addressed.

2. Civil Procedure—Rule 59—Rule 60—request for relief—motion to amend order—abuse of discretion analysis

In an action challenging changes to a revocable trust based on allegations of undue influence, the trial court did not abuse its discretion in denying plaintiffs' postjudgment motion to amend pursuant to Rules 59 and 60 without holding a hearing where plaintiffs failed to request the proper relief under each rule. The Court of Appeals considered whether the trial court violated Rule 17 by dismissing plaintiffs' claims without first inquiring into the competency of the settlor of the trust, and concluded it did not. Plaintiffs' only showing of incompetence was based on unsubstantiated allegations and arguments, while the settlor introduced affidavits from herself and her treating physician asserting her competence.

Appeal by plaintiffs from orders entered 28 March, 18 April, and 12 May 2017 by Judge Beecher R. Gray in Durham County Superior Court. Heard in the Court of Appeals 18 April 2018.

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Law Offices of Hayes Hofler, P.A., by R. Hayes Hofler, III; and Muller Law Firm, PLLC, by Tara Davidson Muller, for plaintiff-appellants Rebecca R. Davis and Matthew M. Davis.

Young Moore and Henderson, P.A., by John N. Hutson, Jr., and Angela Farag Craddock, for defendant-appellee Janet D. Rizzo.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Gary S. Parsons and Jessica B. Thaller-Moran, for defendant-appellee Anne Page Watson.

McPherson, Rocamora, Nicholson & Wilson, PLLC, by Catherine L. Wilson, for intervenor-defendant-appellee Jeanette B. Davis.

ELMORE, Judge.

Plaintiffs Rebecca R. Davis (“Rebecca”) and Matthew M. Davis (“Matthew”) (collectively, “plaintiffs”), daughter-in-law and grandson to ninety-nine-year-old Jeanette B. Davis (“Mrs. Davis”), brought this action, individually as expected beneficiaries of Mrs. Davis’s 11 March 2002 revocable trust (“2002 Revocable Trust”) and on Mrs. Davis’s behalf as settlor of that trust, against defendants Janet D. Rizzo (“Rizzo”), who is Mrs. Davis’s daughter, and Anne Page Watson (“Attorney Watson”), who was one of Mrs. Davis’s estate planning attorneys. Plaintiffs alleged that Mrs. Davis’s mental health has been deteriorating since 2010, and Rizzo has been exerting undue influence on her, thereby invalidating Mrs. Davis’s estate planning decisions from 2014 to 2016, including executing a general power-of-attorney appointing Rizzo as her lawful attorney-in-fact; creating a new trust (“2016 Trust”); and transferring two parcels of real property held in her 2002 Revocable Trust to Rizzo, as trustee of the 2016 Trust. Following Mrs. Davis’s motion to intervene as a party-defendant in the action, the trial court entered an order denying plaintiffs’ motion to continue or stay proceedings, and granting Mrs. Davis’s, Rizzo’s, and Attorney Watson’s (collectively, “defendants”) motions to dismiss plaintiffs’ claims under our Civil Procedure Rule 12(b)(6).

After the trial court denied plaintiffs’ postjudgment motion to amend that order pursuant to Civil Procedure Rules 59 and 60, plaintiffs filed notices of appeal from the trial court’s orders (1) allowing Mrs. Davis to intervene as a party-defendant; (2) denying their motion to continue or stay proceedings, and dismissing their claims; and (3) denying their motion to amend the second order. In response, defendants have filed

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a motion to dismiss plaintiffs' appeals from the first two orders, arguing they violated our Appellate Procedure Rule 3(c)'s thirty-day jurisdictional time limit to take appeal, and that their postjudgment motion to amend did not toll this time because it was not a proper Rule 59 motion. *See* N.C. R. App. P. 3(c)(1), -(3).

Because we agree the motion to amend did not constitute a proper Rule 59 motion sufficient to toll the appeal clock, we allow defendants' motion to dismiss plaintiffs' untimely appeals from the first two orders for lack of jurisdiction. Additionally, because plaintiffs have failed to demonstrate the trial court abused its discretion in denying their motion to amend, we affirm the third order.

I. Background

Ninety-nine-year-old Mrs. Davis and her late husband, Haywood Davis, Sr. ("Haywood, Sr."), had two children together, defendant Rizzo and Haywood Davis, Jr. ("Haywood, Jr."). Haywood, Jr. and his wife, Rebecca, had one child, Matthew.

On 8 February 2017, plaintiffs Rebecca and Matthew, Mrs. Davis's daughter-in-law and grandson, individually as expected beneficiaries of Mrs. Davis's 2002 Revocable Trust and on Mrs. Davis's behalf as trustor of that trust, sued Rizzo, who is Mrs. Davis's only surviving child, and Attorney Watson, who was one of Mrs. Davis's estate planning attorneys. Plaintiffs asserted claims sounding in constructive fraud and breach of fiduciary duty, actual fraud, and undue influence.

According to plaintiffs' complaint, a few years after her late husband Haywood, Sr.'s death, Mrs. Davis on 11 March 2002 created the 2002 Revocable Trust, later revised on 28 December 2010, naming herself as initial trustee and listing her two children, Rizzo and Haywood, Jr., as equal trust fund beneficiaries. The 2002 Revocable Trust provided that if Mrs. Davis's children should predecease her, Haywood, Jr.'s fifty percent share would be distributed equally between his wife, Rebecca, and their son, Matthew; and Rizzo's fifty percent share would be distributed equally to her children. At that time, Mrs. Davis's estate planning attorney, Rupe S. Gill ("Attorney Gill"), was named as first-successor trustee, and two parcels of real property were held in the 2002 Revocable Trust.

However, plaintiffs' complaint alleged, four months after Haywood, Jr.'s death in 2014, Rizzo brought Mrs. Davis to Attorney Gill's office, where Rizzo exerted undue influence on Mrs. Davis to make certain revisions to her 2002 Revocable Trust, including replacing Attorney Gill with Rizzo as first-successor trustee and naming Attorney Gill as special

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co-trustee, and to execute a general power-of-attorney appointing Rizzo as her lawful attorney-in-fact. On 16 July 2015, Rizzo brought Mrs. Davis to defendant Attorney Watson's office, where Rizzo again exerted undue influence on Mrs. Davis to revise her 2002 Revocable Trust by removing Attorney Gill as special co-trustee. On 25 July 2016, Rizzo returned Mrs. Davis to Attorney Watson's office, where Rizzo again exerted undue influence on her to create a new trust, the 2016 Trust, naming Rizzo as trustee. That same day, Rizzo exerted undue influence on Mrs. Davis to convey by general warranty deeds, as trustee of her 2002 Revocable Trust, the two properties previously held in the 2002 Revocable Trust to Rizzo, as trustee of the 2016 Trust.

Plaintiffs further alleged in their complaint that after Mrs. Davis revised her 2002 Revocable Trust in 2010, her "mental health deteriorated" and her "medical records show that [i]n recent years she has been suffering from . . . impaired mental capacity, altered mental status, confusion, and memory loss"; that "when [Mrs. Davis] signed trust-related documents and deeds during the period from 2014 through 2016, she had diminished mental capacity and was under the undue influence of her daughter, [Rizzo]"; and that Mrs. Davis "is a real party in interest and a necessary party . . . but lacks sufficient mental capacity to represent herself in these proceedings." Therefore, plaintiffs requested, *inter alia*, "a guardian ad litem be appointed to represent [Mrs. Davis's] interests . . . as soon as is practicable."

On 22 February 2017, Mrs. Davis filed a verified motion to intervene as a party-defendant in the action and to stay proceedings. Attached to her motion were affidavits from Mrs. Davis and her treating physician of the last seven years, Dr. Allison K. Gard. Mrs. Davis in her affidavit stated: "I have never been adjudicated to be incompetent," and "I am competent." Dr. Gard in her affidavit stated that she performed two "Mini-Mental Status Examination[s]" on Mrs. Davis in February 2017 and September 2016, who "scored 28 out of 30" on both tests. Dr. Gard also stated: "[B]ased upon my personal observation of Mrs. Davis, I do not find any reason why she cannot be in charge of her own affairs[.]" and that she "is one of the highest functioning 98-year-olds that I have had the pleasure to know."

That same day, Mrs. Davis moved under our Civil Procedure Rule 12(b)(6) to dismiss plaintiffs' action, arguing that because she is alive and her 2002 Revocable Trust is revocable, (1) plaintiffs lacked standing to sue as either non-settlor beneficiaries of her 2002 Revocable Trust, or on her behalf as trustor of that trust; (2) there was no justiciable controversy; and (3) plaintiffs' complaint failed to allege a viable claim

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for damages. On 7 and 8 March 2017, defendants Rizzo and Attorney Watson, respectively, filed their answers and defenses, moving under, *inter alia*, Rule 12(b)(1) and -(b)(6) to dismiss plaintiffs' complaint for lack of standing and for failure to state a claim for relief. Defendants' dismissal motions were consolidated for hearing on 14 March.

On 13 March, one day before the scheduled hearing, plaintiffs filed a motion to continue or stay proceedings. In their motion, plaintiffs argued there were "threshold issues . . . which must be decided before the Court can proceed to a merits adjudication of the multiple motions to dismiss . . . suddenly scheduled for hearing[.]" including "[w]hether Mrs. Davis had insufficient mental capacity to knowingly execute the 2016 Trust and the two deeds that conveyed valuable real properties from the 2002 Trust to the 2016 Trust[.]" and "[w]hether Mrs. Davis has insufficient mental capacity now, such that a guardian *ad litem* needs to be appointed to represent her interests in this case before any substantive litigation is allowed to proceed." Plaintiffs alleged they hired a "neuropsychiatrist, Dr. Thomas Gualtieri, to review Mrs. Davis's medical record to tell whether mental incapacity exists in Mrs. Davis"; that "Dr. Gualtieri would have to determine whether it would be necessary to proceed with an independent medical examination of Mrs. Davis"; and that "[a] hearing would then have to be held for the court to determine whether a guardian *ad litem* is required to represent Mrs. Davis' interests in this litigation." Accordingly, plaintiffs requested, *inter alia*, "[a]ll of the dispositive motions be reset for hearing after review of Mrs. Davis' medical record and examination by Dr. Gualtieri if necessary[.]"

After the 14 March consolidated hearing on the parties' motions, the trial court entered orders (1) allowing Mrs. Davis's motion to intervene as a party-defendant ("intervention order"); and (2) denying plaintiffs' motion to continue or stay proceedings, and granting defendants' motions to dismiss the claims under Rule 12(b)(6) ("stay/dismissal order"). The stay/dismissal order was entered on 23 March 2017 and, within ten days after its entry, plaintiffs filed a timely motion styled "motion to amend order" pursuant to Rule 59(a)(1), -(a)(3), and -(a)(8), as well as Rule 60(b)(1) and -(b)(6).

In their motion to amend, plaintiffs again argued they "raised substantial issues which have not been answered in this case[.]" including "[w]hether [Mrs.] Davis had sufficient mental capacity to knowingly execute certain trust documents[.]" and "[w]hether she had sufficient mental capacity to proceed as a party in this case without the appointment of a guardian *ad litem*[.]" Plaintiffs again alleged they hired Dr. Gualtieri to assess Mrs. Davis's mental capacity but that he has been unable to do so

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because he has not been able to review Mrs. Davis's medical records or examine her, allegations supported by Dr. Gualtieri's affidavit attached to the motion. Plaintiffs further alleged "[t]he order of dismissal of this case can be amended to include the relief prayed for herein without disturbing the finality of the dismissal order," and requested the trial court grant the following relevant relief: (1) "Allow Dr. Gualtieri to perform an independent medical examination of [Mrs.] Davis personally"; (2) "[r]elease the complete medical records of [Mrs.] Davis for the last ten (10) years for Dr. Gualtieri's review"; and (3) "[a]llow plaintiffs to be reunited with Mrs. Davis on a regular basis before she passes[.]"

On 12 May 2017, without holding a hearing, the trial court entered an order denying plaintiffs' motion to amend ("postjudgment order"). In that order, the trial court determined:

[T]he present motion to amend the [stay/dismissal] Order . . . is essentially Plaintiffs' attempt to have the court reconsider and set aside the decisions made in the [stay/dismissal] Order The issues determined in the [stay/dismissal] Order . . . are the same issues to be confronted in Plaintiffs' present motion to amend. This court's [stay/dismissal] Order dismissed all claims against Defendants and Defendant-Intervenor.

On 7 June 2017, plaintiffs filed written notices of appeal from the intervention order, the stay/dismissal order, and the postjudgment order.

II. Arguments

On appeal, plaintiffs assert the trial court erred by (1) dismissing their claims before resolving the issue of Mrs. Davis's mental incapacity; (2) denying their motion to continue or stay proceedings; (3) dismissing their claims; and (4) denying their motion to amend the stay/dismissal order. Defendants respond that plaintiffs' appeals from the intervention and stay/dismissal orders, taken respectively seventy-six and fifty days after their entries, were untimely and must be dismissed for lack of jurisdiction. Defendants also argue the trial court properly denied the motion to amend. We discuss threshold jurisdictional issues first.

III. Motion to Dismiss Appeals

[1] In their motion to dismiss plaintiffs' appeals from the stay/dismissal and intervention orders, defendants argue plaintiffs violated our Appellate Procedure Rule 3(c) by failing to file notice of appeal from those orders within thirty days of their entries, and that this thirty-day jurisdictional time limit to take appeal was not tolled by plaintiffs' motion to amend the stay/dismissal order, since that motion was not

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a proper motion under our Civil Procedure Rule 59. *See* N.C. R. App. P. 3(c)(1), -(3); N.C. Gen. Stat. § 1A-1, Rule 59. Defendants argue plaintiffs' motion to amend was not a proper Rule 59 motion sufficient to toll the appeal clock because it (1) requested relief the trial court could not grant, since plaintiffs sought not to "disturb[] the finality of the dismissal order" and thus the trial court lacked authority to order post-dismissal discovery or an injunction in an action no longer pending; (2) impermissibly advanced duplicative arguments already addressed and requests for relief already refused by the trial court in denying their motion to continue or stay proceedings; and (3) failed to allege sufficient grounds under Rule 59(a) for relief.

In their response, plaintiffs assert their motion to amend was a proper Rule 59 motion that tolled the appeal clock, and thus their appeals were timely. Plaintiffs argue (1) although the stay/dismissal order contained a final judgment dismissing their claims, it was predicated upon the erroneous denial of their motion to continue or stay proceedings, and as to that part of the stay/dismissal order, the trial court violated Rule 17(b) by failing to inquire into Mrs. Davis's competency to proceed as a party before dismissing the case; (2) defendants should be equitably estopped from moving to dismiss their appeals based on Rizzo's subsequent fraudulent and other misconduct as alleged in plaintiffs' later filed Rule 60(b) motion, and because defendants unnecessarily delayed their filing of the motion to dismiss until after having participated in a lengthy settlement of the record on appeal; and (3) defendants' motion to dismiss "is but a diversionary tactic to prevent the trial court and now this Court from reviewing [their] case on the merits."

A. Review Standard

Generally, a party has thirty days from the entry of a final judgment to appeal, or we lack jurisdiction to review the judgment and must dismiss the appeal. *See* N.C. R. App. P. (3)(c) (requiring a party to appeal a judgment no longer than thirty days after its entry); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) ("The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal." (quoting *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000))). However, a timely and proper Civil Procedure Rule 59 motion, *see* N.C. Gen. Stat. § 1A-1, Rule 59 (2017), stops the appeal clock until the trial court resolves the motion, *see* N.C. R. App. P. (3)(c)(3). But "when a party makes a motion pursuant to Rule 59 that is not a proper Rule 59 motion, the time for filing an appeal is not tolled." *N.C. All. for Transp. Reform, Inc. v. N.C. Dep't of Transp.*, 183 N.C. App. 466, 470, 645 S.E.2d

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105, 108 (citation omitted), *disc. rev. denied*, 361 N.C. 569, 650 S.E.2d 812 (2007). We review *de novo* whether a postjudgment motion is a proper Civil Procedure Rule 59 motion sufficient to toll Appellate Procedure Rule 3(c)'s thirty-day jurisdictional appeal clock. *See, e.g., id.* at 469, 645 S.E.2d at 107.

B. Discussion

North Carolina Civil Procedure “Rule 59(e) governs motions to alter or amend a *judgment*, and such motions are limited to the grounds listed in Rule 59(a).” *Id.* at 469, 645 S.E.2d at 108 (emphasis added) (citing N.C. Gen. Stat. § 1A-1, Rule 59(e) (2005)). “This Court has adopted a liberal interpretation of the grounds listed in Rule 59(a) when applied to Rule 59(e) motions to amend an order entered without a jury trial and has recognized that Rule 59(a) ‘provides ample basis for a party to seek relief on the basis that the trial court . . . misapprehended or misapplied the applicable law.’” *Baker v. Tucker*, 239 N.C. App. 273, 274, 768 S.E.2d 874, 875 (2015) (quoting *Battle v. Sabates*, 198 N.C. App. 407, 416, 681 S.E.2d 788, 795 (2009)). But “[w]hile failure to give the number of the rule under which a motion is made is not necessarily fatal, the grounds for the motion and the relief sought must be consistent with the Rules of Civil Procedure.” *N.C. All. for Transp. Reform, Inc.*, 183 N.C. App. at 469–70, 645 S.E.2d at 108 (citing *Gallbrunner v. Mason*, 101 N.C. App. 362, 366, 399 S.E.2d 139, 141 (1991)).

Rule 59(e) authorizes a party to seek the relief of “alter[ing] or amend[ing] a *judgment*.” N.C. Gen. Stat. § 1A-1, Rule 59(e) (2017) (emphasis added). “‘A judgment is a determination or declaration on the merits of the rights and obligations of the parties to an action,’ and an order is ‘every direction of a court not included in a judgment.’” *Curry v. First Fed. Sav. & Loan Ass’n of Charlotte*, 125 N.C. App. 108, 112, 479 S.E.2d 286, 289 (1997) (quoting *Hunter v. City of Asheville*, 80 N.C. App. 325, 327, 341 S.E.2d 743, 744 (1986)). “Rule 59, by its plain terms, does not apply to interlocutory, pretrial orders.” *Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC*, ___ N.C. App. ___, ___, 794 S.E.2d 535, 540 (2016); *see also id.* (holding a Rule 59(e) motion to alter or amend a preliminary injunction order did not toll the appeal clock because, in relevant part, the order was not a judgment ending the case on the merits); *Curry*, 125 N.C. App. at 112, 479 S.E.2d at 289 (holding a Rule 59(e) motion to alter or amend an order denying a motion to intervene did not toll the appeal clock because, in relevant part, the order was not a judgment).

Additionally, while a postjudgment motion requesting reconsideration “may properly be treated as a Rule 59(e) motion, it cannot be used

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as a means to reargue matters already argued or to put forth arguments which were not made but could have been made.” *Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417 (citations omitted), *disc. rev. denied*, 346 N.C. 283, 487 S.E.2d 554 (1997); *see also id.* (holding a party’s postjudgment motion that merely “attempt[ed] to reargue matters already decided by the trial court . . . cannot be treated as a Rule 59(e) motion”).

Here, plaintiffs timely filed a “motion to amend order,” identifying Rule 59(a)(1) (“Any irregularity by which any party was prevented from having a fair trial”), -(a)(3) (“Accident or surprise which ordinary prudence could not have guarded against”), and -(a)(8) (“Error in law occurring at the trial and objected to by the party making the motion”), N.C. Gen. Stat. § 1A-1, Rule 59(a)(1), -(a)(3), -(a)(8), as providing grounds to support their requested relief that the trial court “amend the order of dismissal” by granting their discovery and injunction requests “without disturbing the finality of the dismissal order.” Specifically, plaintiffs sought to “amend the order of dismissal . . . for the reasons that follow[:]”

1. As described in the verified complaint, plaintiffs have raised substantial issues which have not been answered in this case:

A. Whether [Mrs.] Davis had sufficient mental capacity to knowingly execute certain trust documents . . . ;

B. Whether she had sufficient mental capacity to proceed as a party in this case without the appointment of a guardian ad litem; and[]

C. Whether plaintiffs . . . should be reunited with Mrs. Davis, age 98, as soon as possible.

2. As shown in his affidavit filed herewith, Dr. Thomas Gualtieri was retained by plaintiffs on February 21, 2017, to perform a neuropsychiatric evaluation of [Mrs.] Davis. He is eminently qualified to do so. But, as he testifies, he cannot develop a definitive evaluation of Mrs. Davis unless he can examine her in person and view her complete medical records.

3. [Mrs.] Davis has for decades enjoyed a very close and loving relationship with her only son, Haywood Davis, Jr., deceased; her son’s wife, Rebecca Davis; her grandson, Matthew Davis; and her great-grandchildren. They have prayed in their complaint that they be reunited with Mrs. Davis, 98, before she passes.

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4. Mrs. Davis has not filed an answer or otherwise been heard from in this case about the quality of her relationship with her grandson, greatgrandchildren, and daughter-in-law. But each of the defendants, and the attorney purporting to represent Mrs. Davis, have declared that Mrs. Davis is perfectly competent to answer for herself regarding her relationship with her loved ones.

5. In their arguments before this court, defendants declared that this case would be more appropriately filed after Mrs. Davis passes. At the same time, they pressed for a hurry-up hearing to have the case dismissed before Mrs. Davis passes, which would ensure that Mrs. Davis never be examined for mental incapacity; that she never be reunited with her grandson, greatgrandchildren, and daughter-in-law; and that she never answer questions under oath about whether she still intended to treat her two children, and their respective families, equally in the disposition of her worldly assets after she passes. Counsel for Mrs. Davis filed a motion to dismiss the case without filing an answer or affidavit on her behalf, while arguing that Mrs. Davis was fully competent to answer for herself, and had decided that she never wanted to see her loved ones again, and never wanted her loved ones to see testamentary documents concerning her last wishes toward them.

Plaintiffs further alleged the “order of dismissal of this case can be amended to include the relief prayed for herein without disturbing the finality of the dismissal order.” They requested the following relief:

1. Allow Dr. Gualtieri to perform an independent medical examination of [Mrs.] Davis personally;
2. Release the complete medical records of [Mrs.] Davis for the last ten (10) years for Dr. Gualtieri’s review;
3. Allow plaintiffs to be reunited with Mrs. Davis on a regular basis before she passes;
4. For such other and further relief as the Court deems appropriate; and
5. That the Court consider the verified complaint as an affidavit in the cause, as well as Dr. Gualtieri’s affidavit filed herewith, each submitted in support of this motion.

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In relevant part, Dr. Gualtieri stated in his affidavit that plaintiffs hired him on 21 February 2017 to perform a neuropsychiatric evaluation on Mrs. Davis, but he “cannot develop a definitive evaluation of Mrs. Davis unless [he] can perform an independent medical examination of her in person, and review her complete medical record.”

While plaintiffs’ motion, under a liberal interpretation, may have alleged adequate *grounds* under Rule 59(a), as to the trial court’s alleged error in failing to inquire into Mrs. Davis’s competency to proceed as a party-defendant before dismissing the case, it failed to request valid Rule 59 *relief*. Rule 59 applies to final judgments, not interlocutory orders. *See, e.g., Tetra Tech Tesoro, Inc.*, ___ N.C. App. at ___, 794 S.E.2d at 540. As plaintiffs concede, the stay/dismissal order contained both a final judgment, the grant of defendants’ Rule 12(b)(6) motions to dismiss plaintiffs’ claims, and an order denying plaintiffs’ motion to continue or stay proceedings. Although the interlocutory decision to deny the motion to continue or stay proceedings presumably predicated the final judgment dismissing the case, plaintiffs’ allegation in their motion to amend that “[t]he order of dismissal of this case can be amended to include the relief prayed for herein *without disturbing the finality of the dismissal order*” (emphasis added), combined with the nature of relief sought being essentially the same relief sought in their motion to continue or stay proceedings, reveals their motion to amend did not request proper Rule 59(e) relief in the form of reconsidering the final judgment dismissing their claims under Rule 12(b)(6), but of reconsidering the interlocutory decision denying their motion to continue or stay proceedings until Mrs. Davis’s competency was determined.

Rule 59 provides no grounds to request relief in the form of reconsidering an interlocutory decision a party alleges is collateral to the merits of a final judgment dismissing the case, or of amending an order dismissing a case by granting previously denied discovery requests or injunctive relief. Further, as defendants argue, in light of plaintiffs not requesting the trial court reconsider its Rule 12(b)(6) dismissals, the relief requested was beyond the trial court’s jurisdiction to grant. *See, e.g., Johnston v. Johnston*, 218 N.C. 706, 709, 12 S.E.2d 248, 250 (1940) (holding a trial court cannot enter orders affecting parties’ rights after dismissing an action).

Moreover, the trial court considered and rejected the merits of these grounds for relief when it denied plaintiffs’ motion to continue or stay proceedings, and their motion to amend presented no pertinent facts not already before the trial court when it entered its stay/dismissal

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order. To support their motion to continue or stay proceedings, plaintiffs similarly alleged:

There are threshold issues in this case which must be decided before the Court can proceed to a merits adjudication of multiple motions to dismiss . . . :

. . . .

B. Whether Mrs. Davis had insufficient mental capacity to knowingly execute the 2016 Trust and the two deeds that conveyed valuable real properties from the 2002 Trust to the 2016 Trust, contrary to the express intent of Mrs. Davis formed when she plausibly did have sufficient mental capacity;

C. Whether Mrs. Davis has insufficient mental capacity now, such that a guardian ad litem needs to be appointed to represent her interests in this case before any substantive litigation is allowed to proceed[.]

. . . .

14. Plaintiffs Rebecca and Matthew have . . . employ[ed] a respected neuropsychiatrist, Dr. Thomas Gualtieri, to review Mrs. Davis's medical record to tell whether mental incapacity exists in Mrs. Davis. Once determining whether it does, Dr. Gualtieri would have to determine whether it would be necessary to proceed with an independent medical examination of Mrs. Davis to render a definitive diagnosis opinion, unless the parties could reach agreement to base this issue on the medical professionals' affidavits after examining the complete medical record. A hearing would then have to be held for the court to determine whether a guardian ad litem is required to represent Mrs. Davis' interests in this litigation.

15. . . . Dr. Gualtieri should be allowed to review the entire medical record and to conduct an independent medical examination of Mrs. Davis, if necessary in order for him to form a[] more informed diagnosis/opinion.

In that motion, plaintiffs also requested substantially the same relief:

4. All of the dispositive motions be reset for hearing after review of Mrs. Davis' medical record and examination by Dr. Gualtieri if necessary[.]

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Rule 59 “cannot be used as a means to reargue matters already argued or to put forth arguments which were not made but could have been made.” *Smith*, 125 N.C. App. at 606, 481 S.E.2d at 417 (citation omitted). Because plaintiffs “attempt[ed] to reargue matters already decided by the trial court . . . the motion . . . cannot be treated as a Rule 59(e) motion.” *Id.*

As plaintiffs’ motion to amend failed to request valid Rule 59(e) relief, and reargued issues already addressed and requested relief already denied, it failed to constitute a proper Rule 59 motion sufficient to toll the appeal clock, rendering their appeals from the intervention and stay/dismissal orders untimely. While we may exercise our discretion and treat plaintiffs’ brief as a petition for *certiorari* review, allow the petition, and review the orders, *see, e.g., Raymond v. Raymond*, ___ N.C. App. ___, ___, 811 S.E.2d 168, 173 (2018) (citations omitted), after considering the merits of their arguments, we decline to do so. Accordingly, we dismiss plaintiffs’ appeals from the stay/dismissal and intervention orders. However, because plaintiffs timely appealed the postjudgment order, that order is properly before us.

IV. Order Denying Postjudgment Relief

[2] Plaintiffs assert the trial court abused its discretion by denying their motion to amend the stay/dismissal order. Their motion to amend identified our Civil Procedure Rule 59(a)(1), -(a)(3), and -(a)(8), as well as Rule 60(b)(1) and -(b)(6).

“As with Rule 59 motions, the standard of review of a trial court’s denial of a Rule 60(b) motion is abuse of discretion.” *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (citing *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975)). Having already concluded Rule 59 provided no grounds for the trial court to grant plaintiffs’ requested relief without “disturbing the finality of the dismissal order,” the trial court did not abuse its discretion in denying their motion under Rule 59 on this basis. Further, Rule 60(b) authorizes a trial court to “relieve a party . . . from a *final* judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment.” N.C. Gen. Stat. § 1A-1, Rule 60(b)(1), -(b)(6) (2017) (emphasis added). Aside from plaintiffs failing to sufficiently argue grounds for Rule 60(b) relief under the subdivisions identified, either in their motion to amend or on appeal, plaintiffs failed to request proper Rule 60(b) relief in setting aside any final judgment, as their motion sought not to “disturb[] the finality of the dismissal order.” Nonetheless, we elect to address plaintiffs’ arguments.

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In their brief, plaintiffs contend, without supportive legal authority or further argument, the trial court erred and abused its discretion in denying their motion to amend by (1) failing to hold a hearing before entering an order denying the motion, (2) concluding the arguments advanced in their motion to amend duplicated arguments already raised, and (3) dismissing their claims without determining Mrs. Davis's competency to proceed as a party in the case. Plaintiffs also attempt in their brief to "refer[] to and incorporate[] . . . by reference" "[t]he arguments contained in [their] response to defendants' motion to dismiss this appeal" "for further support of [their] contention that the trial court's denial of plaintiffs' motion to amend was an abuse of discretion." Plaintiffs' failures to adequately brief these issues constitutes waiver of these arguments. *See* N.C. R. App. P. 28(b)(6).

However, we note a trial court need not hold a hearing before denying a postjudgment motion for relief, *see, e.g., Ollo v. Mills*, 136 N.C. App. 618, 625, 525 S.E.2d 213, 217 (2000) ("Our review of the trial court's decision to enter an order on Ms. Ollo's motion under Rules 59 and 60 without notice or a hearing is limited to whether the trial judge abused his discretion."), and we have already concluded plaintiffs' motion to amend raised the same grounds for relief as their motion to continue or stay proceedings. Further, even if plaintiffs were permitted to incorporate into their brief arguments from their response to defendants' motion to dismiss, a thorough review of that response reveals the only potentially relevant argument is that the trial court violated North Carolina Civil Procedure Rule 17 by dismissing their claims without first inquiring into Mrs. Davis's competency to proceed as a party to the case.

Under Rule 17, "[a] trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention, which raise a *substantial question* as to whether the litigant is *non compos mentis*." *In re J.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005) (emphasis added) (citing *Rutledge v. Rutledge*, 10 N.C. App. 427, 432, 179 S.E.2d 163, 166 (1971)). "Whether the circumstances . . . are sufficient to raise a substantial question as to the party's competency is a matter to be initially determined in the sound discretion of the trial judge." *Id.* (quoting *Rutledge*, 10 N.C. App. at 432, 179 S.E.2d at 166).

Here, plaintiffs' only showing that Mrs. Davis was mentally incompetent and needed a guardian *ad litem* appointed on her behalf was limited to unsubstantiated allegations in their complaint and arguments before the trial court that Mrs. Davis's mental health has been deteriorating since 2010. Although plaintiffs attached to their motion to continue

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or stay proceedings a one-and-a-half-page, type-written summary of Mrs. Davis's alleged medical records from 2008 to 2016, neither have they identified, nor has our review of the record revealed, any legitimate record from any medical provider. In light of the affidavits from Mrs. Davis and her treating physician of seven years, we find no abuse of discretion in the trial court determining that plaintiffs failed to raise a substantial question as to Mrs. Davis's competency.

Because plaintiffs failed to show the trial court abused its discretion in denying their motion to amend under Rules 59 or 60, we affirm the postjudgment order.

V. Conclusion

Because plaintiffs' appeals from the intervention and stay/dismissal orders were untimely and their motion to amend the stay/dismissal order did not constitute a proper Civil Procedure Rule 59 motion sufficient to toll Appellate Procedure Rule 3(c)'s thirty-day jurisdictional appeal clock, we allow defendants' motion to dismiss plaintiffs' appeals from those orders. Because plaintiffs have failed to demonstrate the trial court abused its discretion in denying their motion to amend under Civil Procedure Rules 59 or 60, we affirm the postjudgment order.

DISMISSED IN PART; AFFIRMED IN PART.

Judges TYSON and ZACHARY concur.

IN RE W.H.

[261 N.C. App. 24 (2018)]

IN THE MATTER OF W.H., J.H., J.L.H., & J.E.H.

No. COA18-8

Filed 21 August 2018

1. Evidence—hearsay—exceptions—residual—notice

Where the trial court admitted under the hearsay rule's residual exception out-of-court statements by defendant's daughters regarding his sexual abuse of them, the State provided sufficient notice of the statements—which had already been provided to defendant months earlier—by sending written notice between 1 week and 7 months before the statements were introduced at the various court proceedings on the matter.

2. Evidence—hearsay—exceptions—residual—trustworthiness

Where the trial court admitted under the hearsay rule's residual exception out-of-court statements by defendant's daughters regarding his sexual abuse of them, the trial court did not abuse its discretion in determining the statements were trustworthy. Even though the trial court's findings failed to mention that the daughters recanted their allegations, this failure was not fatal, and the trial court made numerous findings in determining the statements were trustworthy.

3. Evidence—hearsay—exceptions—residual—unavailability

Where the trial court admitted under the hearsay rule's residual exception out-of-court statements by defendant's daughters regarding his sexual abuse of them, the trial court did not err by determining that the daughters were unavailable to testify on the grounds that testifying would traumatize them, would cause them confusion, and would create a risk that they would be untruthful out of guilt and fear. These findings were not inconsistent with the finding that their out-of-court statements were trustworthy.

4. Child Visitation—ceased visitation for father—neglected sons—sexual abuse of daughters

The trial court did not abuse its discretion by ceasing visitation between defendant father and his sons where defendant had sexually abused his daughters, his sons were adjudicated neglected, and the trial court concluded that visitation with any of the children would be against their best interests, health, and safety.

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[261 N.C. App. 24 (2018)]

Appeal by Respondent from orders entered 17 March 2017 and 2 May 2017 by Judge P. Gwynett Hilburn in Pitt County District Court. Heard in the Court of Appeals 6 June 2018.

The Graham.Nuckolls.Conner. Law Firm, PLLC, by Timothy E. Heinle, for Appellee Department of Social Services.

GAL Appellate Counsel, by Matthew D. Wunsche, for guardian ad litem.

Mary McCullers Reece for Respondent-Appellant.

DILLON, Judge.

Jonathan Harris (“Father”) appeals from the trial court’s judgment finding each of his four children neglected, and finding his two daughters to be abused. Father argues the trial court erred and abused its discretion by allowing his daughters’ many out-of-court statements into evidence under the residual exception to the hearsay rule. Father also argues the trial court erred and abused its discretion by ceasing visitation between Father and his sons. We affirm.

I. Background

This case arises from a long timeline of reported abuse. The evidence at the adjudication hearing tended to show as follows:

Father and his wife (“Mother”) married in July 2002 and separated in March 2011. Four children were born from the marriage, W.H. (“Weston”), J.H. (“Jeremy”), J.L.H. (“Julia”), and J.E.H. (“Jasmine”).¹

In December 2011, Mother reported to the Department of Social Services (“DSS”) that Jasmine had been sexually abused by Father in his home. Jasmine told Mother that Father put his penis in her mouth on two occasions. The next day Jasmine was interviewed by a DSS social worker in Mother’s home. Jasmine repeated the statement to the social worker.

Early the next month, on 4 January 2012, Jasmine completed a forensic evaluation at the TEDI Bear Children’s Advocacy Center in Greenville. Jasmine did not disclose sexual abuse, and the medical exam uncovered no physical evidence of any type of sexual contact. The TEDI

1. Pseudonyms are used to protect the identity of the juveniles and for ease of reading. N.C. R. App. P. 3.1(b).

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Bear report provided that “recantation is not uncommon in cases of child sexual abuse” and concluded that Jasmine’s allegations merited further investigations.

A few weeks later, on 20 January 2012, the DSS social worker revisited Mother’s home and asked Jasmine if there was anything else Jasmine wanted to tell her. Jasmine drew pictures suggesting a child having oral contact with a man’s genitals. Jasmine told the social worker that she was the child in the pictures and Father was the man.

About three and a half years later, in August 2015, the 2012 allegations resurfaced. Julia, Father’s younger daughter, told Jasmine that Father had made inappropriate sexual contact with her. Julia then told Mother, and DSS reopened its investigation. Another social worker interviewed both Jasmine and Julia. Both daughters described inappropriate sexual contact and touching of their private parts by Father. On 31 August 2015, Julia described the inappropriate sexual contact to the TEDI Bear Clinic.

In January 2016, DSS filed petitions alleging that Father’s minor children, Weston, Jeremy, Jasmine, and Julia, were neglected, and that Jasmine and Julia were abused. In early 2016, the Pitt County Sheriff’s Department interviewed Jasmine and Julia separately. Both girls stated Father had done something they “didn’t like,” but did not provide further details.

At a preliminary hearing, the trial court determined that the girls were unavailable to testify. The trial court found that the girls were motivated to speak the truth while making prior out-of-court statements, that their recent out-of-court statements to the interviewers at the TEDI Bear Clinic, DSS social workers, and police detectives all possessed circumstantial guarantees of trustworthiness, and admitted the statements pursuant to the residual exception to the hearsay rule. The trial court ultimately adjudicated Jasmine and Julia sexually and emotionally abused, and adjudicated all four children neglected.

Father timely appeals.

II. Analysis

Father makes a number of arguments on appeal, which we address in turn.

A. Residual Exception to Hearsay

Father argues that the trial court erred in allowing his daughters’ many out-of-court statements regarding his alleged sexual abuse of

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them into evidence. Specifically, Father contends that the State failed to provide sufficient notice of the particulars of the statements, as required by Rule 803(24) of the North Carolina Rules of Evidence. Father also contends the trial court failed to consider other factors approved by our Supreme Court in concluding that the statements possessed circumstantial guarantees of trustworthiness, including the daughters' recantation, the factors affecting the daughters' motivation to tell the truth, and the reason for the daughters' unavailability to testify. We disagree.

The admission of evidence pursuant to the residual exception to hearsay is reviewed for an abuse of discretion, "and may be disturbed on appeal only where an abuse of such discretion is clearly shown." *Brissett v. Mount Vernon Undus. Loan Ass'n.*, 233 N.C. App. 241, 246, 756 S.E.2d 798, 803 (2014). The appellant must show that "[he or she] was prejudiced and a different result would have likely ensued had the error not occurred." *Id.*

When employing Rule 803(24), our Supreme Court has interpreted the residual exception to require the trial court to determine whether (1) proper notice has been given; (2) the hearsay statement is not specifically covered elsewhere; (3) the statement possesses circumstantial guarantees of trustworthiness; (4) the statement is material; (5) the statement is more probative than any other evidence which the proponent can procure through reasonable efforts; and (6) the interest of justice will be best served by admission. *See State v. Smith*, 315 N.C. 76, 92-96, 337 S.E.2d 833, 844-46 (1985); N.C. R. Civ. P. § 8C, Rule 803(24).

[1] Father challenges the trial court's decision on several grounds. First, Father argues that the trial court erred in determining that DSS provided proper notice of its intention to offer the daughters' statements and their particulars sufficiently in advance to provide Father with a fair opportunity to prepare for the hearing. Our Supreme Court has instructed that the notice requirement is flexible and that notice is sufficient so long as it gives the opposing party "fair opportunity to meet the proffered evidence." *State v. Triplett*, 316 N.C. 1, 12-13, 340 S.E.2d 736, 743 (1986).

In this case, DSS sent written notice to Father of its intent to use the out-of-court statements made by his daughters to TEDI Bear, the Pitt County Sherriff's Office, North Hampton County DSS, and Pitt County DSS. DSS sent this written notice between one week and seven months before the statements were introduced at the varying hearings and trial that followed. And these statements had been previously provided to Father many months before DSS sent its written notice. We have reviewed the case law on point and the record in this case and hold

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that the trial court did not err in determining that the State provided sufficient notice to afford Father a fair opportunity to prepare, in compliance with Rule 803(24).

[2] Father next argues the trial court erred in determining that his daughters' out-of-court statements were trustworthy because the trial court failed to consider that his daughters had recanted their accusations during their 2012 TEDI Bear interviews. Our Supreme Court has often used the following factors in determining a statement's trustworthiness: (1) the declarant's personal knowledge of the underlying event; (2) the declarant's motivation to speak the truth or otherwise; (3) whether the declarant ever recanted the testimony; and (4) the practical availability of the declarant at trial for meaningful cross-examination. *State v. Valentine*, 357 N.C. 512, 518, 591 S.E.2d 846, 852-53 (2003); *Smith*, 315 N.C. at 93-94, 337 S.E.2d at 845. We note that any recantation of testimony is a factor. However, our Supreme Court has also instructed that "[n]one of these [four] factors, alone or in combination, may conclusively establish or discount the statement's 'circumstantial guarantees of trustworthiness.'" *Id.*

Here, the trial court made a number of findings regarding the numerous out-of-court statements made by Jasmine and Julia concerning their Father's abuse. It is true that the trial court made no mention of the daughters' 2012 TEDI Bear interview. Our Supreme Court, though, has held that the failure of a trial court to make findings in this regard is not fatal. *Valentine*, 357 N.C. at 519, 591 S.E.2d at 853. We have reviewed the trial court's findings and the record, and we conclude that the trial court did not abuse its discretion in determining that the out-of-court statements were trustworthy.

[3] Finally, Father argues that the trial court erred in determining that his daughters were unavailable to testify at trial. The trial court made this determination based on its findings that the out-of-court statements were trustworthy, that testifying would traumatize the daughters, that testifying would cause them confusion, and that there would be a risk that they would not be truthful out of guilt and fear. Specifically, Father contends that it was improper and inconsistent for the trial court to find that all of the out-of-court statements possessed sufficient circumstantial guarantees of trustworthiness, but that the daughters' confusion and anxiety might compromise the truthfulness of their testimony in court. Father relies on *State v. Stutts*, in which we held that "finding a witness unavailable to testify because of an inability to tell truth from fantasy prevents that witness' out-of-court statements from possessing

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guarantees of trustworthiness . . . under the residual exception[.]” *State v. Stutts*, 105 N.C. App. 557, 563, 414 S.E.2d 61, 64-65 (1992).

However, in *Stutts*, the trial court determined that a juvenile was unavailable because she had an inability to discern truth from falsehood. On appeal, our Court held that the trial court’s reasoning also led to a conclusion that *any* statement made by the juvenile – even her out-of-court statements – were untrustworthy, since she could not tell truth from fantasy. *Id.* In the present case, the trial court did not reason that the daughters could not tell truth from fantasy, but rather that they would more likely be intentionally untruthful out of guilt and fear. *See State v. Holden*, 106 N.C. App. 244, 251-52, 416 S.E.2d 415, 420 (1992) (distinguishing *Stutts*, holding that trial court did not err based on finding that witness was unavailable due to “fear and trepidation”).

B. Suspension of Visitation Rights

[4] Father argues it was error for the trial court to consider the girls’ best interest in lieu of the boys’ best interest in determining whether Father could continue to visit with the boys. We disagree.

“This Court reviews the trial court’s dispositional orders of visitation for an abuse of discretion.” *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007); N.C. Gen. Stat. §§ 7B-507 (2015). Section 7B-507 requires a child to be placed in the custody of DSS if returning the child to his or her home would be against the child’s health and safety. N.C. Gen. Stat. §§ 7B-507.

The trial court here found that, because Father had been found to have sexually abused his daughters and his sons were adjudicated to have been neglected, further visitation with any of the children was against the children’s best interests, health, and safety. Father’s conduct toward his daughters directly influenced the trial court’s determinations, but only insofar as it suggested that further contact could put the sons’ safety at risk. We have reviewed the trial court’s order and hold the trial court did not abuse its discretion in ceasing further visitation with Father.

AFFIRMED.

Judges DAVIS and INMAN concur.

SHELL v. SHELL

[261 N.C. App. 30 (2018)]

DAVID W. SHELL AND DONNA SHELL, PLAINTIFFS

v.

DAVID DWAYNE SHELL AND NICOLE RENEE GREEN, DEFENDANTS

No. COA17-990

Filed 21 August 2018

1. Child Custody and Support—modification of prior order—substantial change of circumstances—sobriety

A mother's maintenance of sobriety for over four years and the resulting changes in her life were a substantial change in circumstances for purposes of modifying a prior custody order. Her ability to care for the children had improved dramatically.

2. Child Custody and Support—modification of prior order—substantial change of circumstances—mother's remarriage

A mother's remarriage constituted a change in circumstances in an action to modify a child custody order where the father contended that the relationship between the children and their stepfather had not changed. The trial court's finding of the stepfather's development of a strong relationship with the children and his positive involvement in the children's lives was a change of circumstances affecting the children's welfare.

3. Child Custody and Support—modification of prior order—substantial change of circumstances—communication between parents

Changes in communication between the parents constituted a substantial change in circumstances in an action to change a prior custody order. Although the father argued that no substantial change in communications had occurred because the parties had had difficulty with communication before the prior order, the trial court noted that the father had become less cooperative and less willing to communicate.

4. Child Custody and Support—modification of prior order—substantial change of circumstances—father's capabilities

In a proceeding to modify a prior child custody order, there was a change in circumstances concerning the father's inability to read and to help the children with their schoolwork. Although the father argued that there had been no change since the prior order, the father's limited capabilities had more impact on the children as they advanced in school.

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5. Child Custody and Support—modification of prior order—substantial change of circumstances—best interests of children

The trial court did not abuse its discretion by determining that it was in the best interests of the children to change custody so that they primarily resided with their mother. Previously, primary custody had been with the father, with the children residing with the paternal grandparents, but the trial court found that primary residence with their mother was in their best interests due the mother's maintenance of sobriety, her ability to maintain a stable job and provide a proper home, the children's close relationship to their stepfather, the father's increasingly autocratic control seeking to shut the mother out of the children's lives, and the father's need to rely on his parents to care for the children.

Appeal by plaintiffs and defendant Shell from order entered 6 February 2017 by Judge Hal G. Harrison in District Court, Watauga County. Heard in the Court of Appeals 8 February 2018.

Anné C. Wright, for plaintiffs-appellants.

Epperson Law, PLLC, by James L. Epperson, for defendant-appellee Nicole Renee Green.

STROUD, Judge.

Plaintiffs and defendant Shell appeal a custody modification order changing primary physical custody from defendant Shell to defendant Green. Because the trial court's findings of fact support its conclusion there had been a substantial change in circumstances affecting the best interest of the children and that modification would be in their best interest, we affirm.

I. Background

This appeal arises from the modification of a 2012 custody order. Plaintiffs, David and Donna Shell, are the paternal grandparents of the children, Sam and Kim.¹ Defendant David Shell is the son of plaintiffs and father of Sam and Kim. Defendant Nicole Green is the children's mother and has married since the prior order and is now Nicole McKiernan. We will identify all parties by their relation to Sam and Kim. Therefore,

1. A pseudonym is used to protect the privacy of the minors involved.

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plaintiffs will be referred to as the “Grandparents,” defendant Shell as “Father” and defendant Green as “Mother.” Although both parents are “defendants,” the interests of defendant Father are aligned with plaintiff Grandparents and are opposed to the interests of defendant Mother.

The prior custody order was entered in May 2012. Father was granted sole legal and physical custody of the children and Mother had visitation rights. At the time of the prior order, Father and the children resided with Grandparents; they still lived with Grandparents at the time of the hearing on the motion to modify custody. Father “has limited education and intelligence[,]” struggles with literacy, and “relies heavily on his parents.” In 2011, Mother had admitted to Father she was using marijuana, cocaine, and alcohol to excess. She was also “spending time” with a man who later went to prison for selling methamphetamine. She had moved four times in the ten months prior to the hearing because she could not afford rent or utilities. She also could not keep a job, and she was fired or quit jobs several times. At the time of the 2012 hearing, the children were ages five and two. Mother’s home was 45 minutes away from the older child’s school. In August 2011, Grandmother went to her home and found it was strewn with trash and empty alcohol containers. One child had cut her foot on glass on the floor, and Grandmother took her away from Mother’s home. In September 2011, Mother had posted nude photos on the internet, was drinking heavily, and was not making good decisions. Father was living with his parents in a stable home.

On 3 June 2016, Mother moved to modify custody alleging that since the prior custody order there had been a substantial change of circumstances affecting the welfare of the children because she had remained sober for several years, maintained a job for over two years, and gotten remarried. She also alleged that Father had become more difficult to deal with regarding visitation. He refused to send the children’s homework so the children could complete it during visits with Mother, and he denied Mother information about the children’s school activities and would not allow her to participate.

On 17 and 30 January 2017, the trial court held a hearing on the motion to modify custody. The trial court entered an order modifying custody on 6 February 2017, which determined there had been a substantial change of circumstances affecting the welfare of the children and modified custody, granting Father and Mother joint legal custody, with Mother receiving primary physical custody. Father and Grandparents appeal.²

2. Grandparents have filed a petition for writ of certiorari with this Court because their notice of appeal was not timely; however, Father provided timely notice of appeal,

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II. Modification of Custody

Father first contends that “the trial court erred in finding that there were substantial changed circumstances since the entry of the last custodial order in May 2012 when little, if anything, had changed [and] any changes that did occur did not affect the welfare of the children” and even “assuming *arguendo* that there was a substantial change in circumstance materially affecting the children, the trial court nevertheless abused its discretion by ‘flipping’ the previous custody arrangement and disrupting the children’s stability and routine.” (Original in all caps).

A. Standard of Review

It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody. The party seeking to modify a custody order need not allege that the change in circumstances had an adverse effect on the child. While allegations concerning adversity are acceptable factors for the trial court to consider and will support modification, a showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody.

As in most child custody proceedings, a trial court’s principal objective is to measure whether a change in custody will serve to promote the child’s best interests. Therefore, if the trial court does indeed determine that a substantial change in circumstances affects the welfare of the child, it may only modify the existing custody order if it further concludes that a change in custody is in the child’s best interests.

The trial court’s examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the trial court concludes

and he and Grandparents have filed one joint brief. Because we will necessarily consider Grandparent’s arguments based upon Father’s timely appeal, we need not grant their petition for writ of certiorari and thus dismiss it.

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either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered. If, however, the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child's best interests. If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order.

When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges. Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary.

In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law. With regard to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interests. If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's

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best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

Shipman v. Shipman, 357 N.C. 471, 473-75, 586 S.E.2d 250, 253-54 (2003) (citations, quotation marks, and brackets omitted).

B. Substantial Change in Circumstances

Father does not challenge the findings of fact as unsupported by the evidence but contends that the facts are not enough to establish a substantial change in circumstances affecting the welfare of the children since entry of the 2012 order. His argument addresses several of the circumstances addressed by both the 2012 order and the order on appeal. We address each in turn.

1. Sobriety

[1] In the 2012 order, as noted above, Mother's living circumstances were very unstable and she was unable to care for the children properly. In the order on appeal, the trial court found that when the 2012 order was entered, Mother had been sober for about eight months, but she was still "struggling with her sobriety" and that she was selfish. As of the 2017 hearing, Mother had been sober from drugs and alcohol for about four years. Father argues Mother's sobriety is not a change of circumstances because at both times, she was sober. We disagree.

Changes in circumstances may be either negative or positive. *See, e.g., Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998) ("[C]ourts must consider and weigh all evidence of changed circumstances which affect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child. In appropriate cases, either may support a modification of custody on the ground of a change in circumstances."). Here, the trial court's findings show that Mother had made positive changes that affect the children. The trial court's findings in the 2012 order detailed the detrimental effects Mother's drug and alcohol abuse was having on the children, resulting in her inability to keep a job or residence and her poor judgment. In contrast, the order on appeal details how these things had improved dramatically: Mother had maintained a stable job and home and had become a loving and caring parent. There is no doubt that a parent's alcohol and drug abuse normally has negative effects on children, as Mother's did prior to the 2012 order. Mother's maintenance of her sobriety for over four years and the resulting changes in her life show that her ability to

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care for the children had improved dramatically. *See generally Dreyer v. Smith*, 163 N.C. App. 155, 159, 592 S.E.2d 594, 596 (2004) (“Here, however, the trial court made ample findings of fact describing the negative effect of Ms. Smith’s remarriage on the children. We hold that these findings – setting forth the children’s exposure to alcohol abuse, violent behavior, illegal drugs, and a risk of physical harm – support the trial court’s conclusion that there has been a substantial change of circumstances affecting the welfare of the children.”).

Father also contends that even if Mother’s sobriety is a change of circumstances, it has no effect on the children. This argument is difficult to understand, since Father contended – quite correctly – in 2012 that Mother’s substance abuse was still having detrimental effects on the children, even after she had been sober for a few months. Her life was still unstable, even if she was not actively using drugs or alcohol. Considering the other findings in the order regarding the positive changes in Mother’s life which have accompanied her sobriety, this argument is entirely without merit. *See id.* The trial court’s order includes many findings detailing these effects – Mother’s involvement with the children, her ability to provide a home and support them, and her becoming a caring parent instead of a selfish and unreliable one.

2. Remarriage

[2] Father next contends that Mother’s remarriage was not a substantial change of circumstances, as the relationship between the children and their now-stepfather did not change. “[R]emarriage, in and of itself, is not a sufficient change of circumstance affecting the welfare of the child to justify modification of the child custody order without a finding of fact indicating the effect of the remarriage on the child.” *Evans v. Evans*, 138 N.C. App. 135, 140, 530 S.E.2d 576, 579 (2000). But the trial court found this relationship had become stronger and was beneficial to the children: “*Since the entry of the prior Order* Thomas McKiernan has developed a strong bond with the children and is very involved in their lives during periods of visitation provided to” Mother. (Emphasis added.) The trial court’s finding of the stepfather’s development of a strong relationship with the children and his positive involvement in the children’s lives is a change of circumstances that affects the children’s welfare.

3. Difficult Communication

[3] Father next argues that the parties had difficulty with communication prior to entry of the 2012 order so no substantial change of circumstances has occurred, and even if their communications had changed,

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this did not affect the children nor was there any evidence it did. We addressed a similar argument regarding the parents' difficulties in communication in *Laprade v. Barry*:

It is beyond obvious that a parent's unwillingness or inability to communicate in a reasonable manner with the other parent regarding their child's needs may adversely affect a child, and the trial court's findings abundantly demonstrate these communication problems *and* the child's resulting anxiety from her father's actions. While father is correct that this case overall demonstrates a woeful refusal or inability of both parties to communicate with one another as reasonable adults on many occasions, we can find no reason to question the trial court's finding that these communication problems are *presently* having a negative impact on Reagan's welfare that constitutes a change of circumstances. In fact, it is foreseeable the communication problems are likely to affect Reagan more and more as she becomes older and is engaged in more activities which require parental cooperation and as she is more aware of the conflict between her parents. Therefore, we conclude that the binding findings of fact support the conclusion that there was a substantial change of circumstances justifying modification of custody.

Laprade v. Barry, __ N.C. App. __, __, 800 S.E.2d 112, 117 (2017) (citation omitted).

Here, the trial court specifically noted the changes in communication and cooperation since the 2012 order. Although the parties had always had trouble communicating, Father had become even less willing to cooperate with Mother. Father had refused to allow Mother to get information regarding the children's education, including their report cards; he refused to allow Mother to attend school activities and parent teacher conferences; he failed to send the children's homework with them when they visited Mother; and refused to allow Mother to have the children's medical information. At the time of the prior order, the older child was just beginning school and the younger was only two. At the time the trial court entered the order on appeal modifying custody, the children were ages ten and seven, and both were in school and extracurricular activities. Just as in *Laprade*, "[i]t is beyond obvious" how Father's unwillingness to communicate with Mother regarding the children's school and medical needs would have a negative effect on the children that becomes more substantial as the children grow older. *Id.*

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at ___, 800 S.E.2d at 117. In addition, the trial court's order includes findings about how Father's refusal to share information, particularly about school, is detrimental the children.

4. Father's Capabilities

[4] Father also contends that he has always needed assistance from his parents and there has not been a change in his capabilities since entry of the 2012 order. The trial court also addressed the detrimental effects of Father's inability to read and to assist the children with school work. Despite his lack of ability to help the children, he still he refused to allow Mother to help by sending homework with them and allowing Mother to be involved in parent teacher conferences. As just noted in *Laprade*, above, as children become older, they have more involvement with school activities, parent-teacher meetings become more detailed, and homework becomes more complex. As the children have advanced in school, Father's limited capabilities have had more of an impact on the children's lives and this will likely continue as the children get older. *See id.* at ___, 800 S.E.2d at 117. Father's argument fails to take into account the fact that the children themselves are always changing and their needs change, although his abilities have remained the same. His inability to read and to assist the children with schoolwork affects the children more as they progress through their own education and must do more challenging work.

5. Conclusion

The trial court's findings of fact regarding Mother's years of sobriety, her remarriage along with the stepfather's positive relationship with the children, Father's and Mother's worsening communications, and Father's limited capabilities, while the children's needs are becoming more complex, support its conclusion there have been substantial changes of circumstances since the prior order that affect the welfare of the minor children. *See generally Shipman*, 357 N.C. at 473-75, 586 S.E.2d at 253-54.

C. Best Interests

[5] *Last, Father contends that even assuming* there was a substantial change of circumstances affecting the welfare of the children, it was not in their best interest to change custody as the "best interests were that they remain with their Father in the paternal Grandparents' home." (Original in all caps.) Again, "a trial court's principal objective is to measure whether a change in custody will serve to promote the child's best interests." *Id.* at 474, 586 S.E.2d at 253.

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Once the trial court makes the threshold determination that a substantial change has occurred, the court then must consider whether a change in custody would be in the best interests of the child. As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion.

Metz v. Metz, 138 N.C. App. 538, 540-41, 530 S.E.2d 79, 81 (2000) (citations omitted).

Here, the trial court found that due to Mother's maintenance of her sobriety, ability to maintain a stable job and provide a proper home, the children's close relationship to their stepfather, Father's increasingly "autocratic" control seeking to shut Mother out of the children's lives, and Father's continued need to rely on his parents to care for his children, it was in the best interests of the children to primarily reside with their Mother. We discern no abuse of discretion with this determination.

III. Conclusion

Because the trial court's findings of fact support its conclusion there was a substantial change of circumstances affecting the welfare of the minor children since the prior order and because the trial court did not abuse its discretion in concluding it was in the best interests of the children to primarily reside with their Mother, we affirm.

AFFIRMED.

Judges DILLON and INMAN concur.

SMITH v. USAA CAS. INS. CO.

[261 N.C. App. 40 (2018)]

EDWARD R. SMITH AND ARCHIE N. SMITH, BY AND THROUGH HIS GUARDIAN AD LITEM,
JENNIE L. SMITH, PLAINTIFFS

v.

USAA CASUALTY INSURANCE COMPANY, ERIE INSURANCE COMPANY,
ZURICH AMERICAN INSURANCE COMPANY, UNIVERSAL UNDERWRITERS
INSURANCE COMPANY, VALLEY AUTO WORLD, INC. AND
THE ESTATE OF JOHN PINTO, JR., DEFENDANTS

No. COA17-1080

Filed 21 August 2018

1. Appeal and Error—interlocutory—substantial right affected—duty to defend

An appeal from a summary judgment in an automobile accident case affected a substantial right and was properly before the Court of Appeals where it implicated an insurance company's duty to defend.

2. Declaratory Judgments—standing—automobile accident—third party victim

Third party automobile accident victims did not have standing to seek a declaratory judgment as to the coverage of insurance policies in which they were not named insureds. Although this was a conditionally delivered vehicle purchased the day of the accident, N.C.G.S. § 20-75.1 did not address the rights of third-party accident victims.

3. Declaratory Judgments—standing—insurance company—automobile accident

An insurance company had standing to seek a declaratory judgment under N.C.G.S. § 1-257 as to coverage obligations arising from an automobile accident and an underlying tort action.

4. Parties—necessary—declaratory judgment determining insurance obligation

A summary judgment in an action to determine insurance coverage after an automobile accident was vacated and remanded for the joinder of necessary parties. The accident occurred the night after the used vehicle was purchased. While the car dealership and a credit leasing company acted as if the dealer was the owner of the vehicle, ownership was still with the latter entity when the accident occurred and neither it nor any of its insurers were made parties to the action.

SMITH v. USAA CAS. INS. CO.

[261 N.C. App. 40 (2018)]

Appeal by defendant Universal Underwriters Insurance Company from order entered 13 April 2017 by Judge Richard T. Brown in Hoke County Superior Court. Heard in the Court of Appeals 5 April 2018.

Van Camp, Meacham & Newman, PLLC, by Thomas M. Van Camp, for plaintiffs-appellees.

Martineau King PLLC, by Elizabeth A. Martineau and Lee M. Thomas, for defendant-appellee Erie Insurance Company.

Gallivan, White, & Boyd, P.A., by James M. Dedman, IV, for defendant-appellant Universal Underwriters Insurance Company.

DAVIS, Judge.

On 30 April 2016, John Pinto, Jr. sought to purchase a vehicle from Valley Auto World (“VAW”), a car dealership in Fayetteville, North Carolina. Although the sales documents listed VAW as the seller of the vehicle, the actual owner was a separate entity, VW Credit Leasing, Ltd. (“VW Credit”). Later that evening, Pinto was killed in a collision while driving the vehicle. The occupants of the other car involved in the wreck were seriously injured and filed a negligence lawsuit against Pinto’s estate along with a request for a declaratory judgment as to the liability insurance obligations of several insurers in connection with the accident. Following the filing of motions for summary judgment by the parties, the trial court entered an order determining that VAW’s insurer provided primary liability insurance coverage to Pinto’s estate and that excess coverage was provided by Pinto’s personal insurer. Because we conclude that the absence of necessary parties in this lawsuit precluded the entry of a declaratory judgment, we vacate the trial court’s order and remand for further proceedings.

Factual and Procedural Background

On 23 April 2016, Cheryl Copes returned a 2013 Volkswagen Beetle (the “Beetle”) to VAW that she had previously leased from VW Credit.¹ At that time, Copes still owed \$14,836 on her lease. Shortly after Copes completed her trade-in, the Beetle was placed on the VAW lot for resale. At that time, VAW had not yet paid off the remainder of the amount owed

1. The record contains testimony from a VAW employee stating that a “dealer agreement” existed between VAW and VW Credit on 30 April 2016. However, the record does not further explain the precise nature of their relationship.

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to VW Credit under Copes' lease. As a result, VW Credit remained the title owner of the vehicle.

On the morning of Saturday, 30 April 2016, Pinto went to VAW for the purpose of trading in his 2004 Saturn and purchasing another vehicle. He ultimately decided to purchase the Beetle that had been traded in by Copes. Despite the fact that VAW did not actually own the vehicle, VAW sales representatives and Pinto nevertheless agreed upon a purchase price of \$14,500 for the Beetle with a trade-in value of \$2,000 for the Saturn. Because Pinto did not put any money down, a credit application was prepared and submitted by VAW to VW Credit for \$12,500, the full amount necessary to fund the purchase.²

At 12:05 p.m., while Pinto remained on the VAW premises, VAW received a fax from VW Credit containing VW Credit's approval of \$11,990 in financing for Pinto's purchase of the Beetle. As a result, a \$510 gap remained between the amount of financing approved by VW Credit and the total purchase price of the vehicle that had been agreed upon by Pinto and VAW. Despite this shortfall, Gary Carrington, the business manager of VAW, believed that he would ultimately be able to secure the full financing amount by resubmitting Pinto's credit application to VW Credit the following Monday. For this reason, Carrington proceeded to assist Pinto in completing the necessary paperwork memorializing the sale.

Among the various documents executed by Pinto and VAW on 30 April 2016 was a Conditional Delivery Agreement ("CDA"). The CDA stated, in pertinent part, as follows:

DEALER'S obligations to sell the SUBJECT VEHICLE to PURCHASER and execute and deliver the manufacturer's certificate of origin or certificate of title to SUBJECT VEHICLE are expressly conditioned on FINANCE SOURCE'S approval of PURCHASER'S application for credit as submitted AND dealer being paid in full by FINANCE SOURCE.

Upon signing the documents provided to him by Carrington, Pinto drove the Beetle off the VAW lot that afternoon. Later that evening, Pinto was driving the Beetle when he was involved in a head-on collision (the "30 April Accident") with another vehicle being driven by Edward Smith.

2. While the record is unclear on this issue, it appears that both VAW and VW Credit were under the mistaken impression that VAW owned the Beetle.

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Smith's son, Archie, was a passenger in his vehicle. Pinto was killed in the collision, and both Edward Smith and Archie Smith were seriously injured.

Unaware of Pinto's death, Carrington resubmitted his credit application to VW Credit on 2 May 2016. At 4:40 p.m. that day, VW Credit faxed VAW its approval for the full \$12,500 that VAW had requested. The following day, VAW paid off the balance owed to VW Credit under Copes' lease. On 9 May 2016, VW Credit executed a reassignment of title to VAW. VAW, in turn, transferred title to Pinto on 23 May 2016.

On 10 June 2017, the Smiths filed a lawsuit in Hoke County Superior Court that contained both negligence claims stemming from the 30 April Accident and a declaratory judgment claim seeking a determination as to "the nature and extent of insurance coverage provided to John Pinto, Jr. on April 30, 2016" as well as "the rights, status, and legal relations between the parties with respect to said insurance coverage." The complaint named as defendants Erie Insurance Company ("Erie"), the liability insurer for Pinto's Saturn; Universal Underwriters Insurance Company ("Universal"), the insurer that provided liability coverage for VAW; Pinto; and VAW.³ On 22 August 2016, Erie filed a cross-claim seeking a declaratory judgment "as to the rights and obligations of . . . the insurer Defendants."

Universal filed a motion to dismiss the Smiths' claims for lack of standing on 16 August 2016. On 24 August 2016, the Smiths filed a motion for judgment on the pleadings. Motions for summary judgment were subsequently filed by the Smiths, Universal, and Erie.⁴

A hearing was held on the parties' motions before the Honorable Richard T. Brown on 13 March 2017. On 13 April 2017, Judge Brown issued an order stating, in pertinent part, as follows:

[B]ased upon the undisputed facts, . . . [Universal] shall provide to the Defendant Estate of John Pinto, in connection with the automobile accident which is the subject of

3. Two other insurers, USAA Casualty Insurance Company ("USAA") and Zurich American Insurance Company ("Zurich"), were also originally named as defendants but were later dismissed from the lawsuit by the Smiths. It appears from the record that Pinto had unsuccessfully attempted to contact USAA on 30 April 2016 to inquire about the possibility of obtaining insurance for the Beetle. The record further indicates that Zurich had previously issued an insurance policy to VAW. In addition, although the complaint named Pinto as a defendant, Pinto's estate was later substituted as a party in his place. Finally, the Smiths also later dismissed VAW as a party.

4. The motions filed by the parties related solely to the declaratory judgment claims asserted by the Smiths and Erie.

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this lawsuit, primary insurance coverage in the amount of \$500,000.00 and umbrella liability insurance coverage in the amount of \$10,000,000.00 and . . . [Erie]’s liability policy provides excess coverage for the Defendant Estate of John Pinto, in connection with the automobile accident which is the subject of this lawsuit, after [Universal]’s policy limits of \$10,500,000.00 have been exhausted.

The trial court’s determination as to the respective coverage obligations of Universal and Erie was based on the court’s ruling that N.C. Gen. Stat. § 20-75.1 governed the sale of the Beetle to Pinto.⁵ Universal filed a timely notice of appeal.

Analysis

“On an appeal from an order granting summary judgment, this Court reviews the trial court’s decision *de novo*.” *Mitchell, Brewer, Richardson, Adams, Burge & Boughman v. Brewer*, __ N.C. App. __, __, 803 S.E.2d 433, 443 (2017) (citation and quotation marks omitted), *disc. review denied*, 370 N.C. 693, 811 S.E.2d 161 (2018). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *Premier, Inc. v. Peterson*, 232 N.C. App. 601, 605, 755 S.E.2d 56, 59 (2014) (citation and quotation marks omitted).

It is well established that “[t]he moving party has the burden of demonstrating the lack of any triable issue of fact and entitlement to judgment as a matter of law. The evidence produced by the parties is viewed in the light most favorable to the non-moving party.” *Hardin v. KCS Int’l, Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (internal citations omitted). We have held that “[a]n issue is ‘genuine’ if it can be proven by substantial evidence and a fact is ‘material’ if it would constitute or irrevocably establish any material element of a claim or a defense.” *In re Alessandrini*, 239 N.C. App. 313, 315, 769 S.E.2d 214, 216 (2015) (citation omitted).

5. N.C. Gen. Stat. § 20-75.1 sets out the circumstances under which a conditionally delivered vehicle remains covered under the car dealership’s liability insurance policy in cases where the sale of the vehicle by the dealer is contingent upon the purchaser obtaining financing for the purchase.

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[261 N.C. App. 40 (2018)]

I. Universal's Interlocutory Appeal

[1] As an initial matter, we must determine whether Universal's appeal is properly before us. *See Hous. Auth. of City of Wilmington v. Sparks Eng'g, PLLC*, 212 N.C. App. 184, 187, 711 S.E.2d 180, 182 (2011) (“[A]n appellate court has the power to inquire into jurisdiction in a case before it at any time, even *sua sponte*.” (citation and quotation marks omitted)).

“A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.” *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (citation omitted). Conversely, an order or judgment is interlocutory if it does not settle all of the issues in the case but rather “directs some further proceeding preliminary to the final decree.” *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985) (citation omitted).

“Generally, there is no right of immediate appeal from interlocutory orders and judgments.” *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, 228 N.C. App. 314, 317, 745 S.E.2d 69, 72 (2013) (citation and quotation marks omitted). The prohibition against interlocutory appeals “prevents fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts.” *Russell v. State Farm Ins. Co.*, 136 N.C. App. 798, 800, 526 S.E.2d 494, 496 (2000) (citation and brackets omitted).

However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

N.C. Dep't of Transp. v. Page, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (internal citations omitted).

The trial court's 13 April 2017 order does not contain a certification under Rule 54(b). Therefore, Universal's appeal is proper only if it can demonstrate a substantial right that would be lost absent an immediate appeal. *See Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001) (“The burden is on the appellant to establish that a substantial

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right will be affected unless he is allowed immediate appeal from an interlocutory order.” (citation omitted)).

As our Supreme Court has noted, “the ‘substantial right’ test for appealability of interlocutory orders is more easily stated than applied.” *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). As a result, the extent to which an interlocutory order affects a substantial right must be determined on a case-by-case basis. *McCallum v. N.C. Coop. Extension Serv.*, 142 N.C. App. 48, 50, 542 S.E.2d 227, 231 (citation omitted), *appeal dismissed and disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001).

Universal contends that the trial court’s order implicated a substantial right by determining that its policy provided coverage for Pinto such that Universal would be required to defend his estate in the underlying tort action. We agree.

It is well established that “[w]here there is a pending suit or claim, an interlocutory order concerning the issue of whether an insurer has a duty to defend in the underlying action affects a substantial right that might be lost absent an immediate appeal.” *Cinoman v. Univ. of N.C.*, 234 N.C. App. 481, 483, 764 S.E.2d 619, 621-22 (citation and quotation marks omitted); *see also Lambe Realty Inv., Inc. v. Allstate Ins. Co.*, 137 N.C. App. 1, 4, 527 S.E.2d 328, 331 (2000) (“[T]he duty to defend involves a substantial right to both the insured and the insurer.” (citation omitted)).

In the present case, Pinto was not a named insured of Universal. Consequently, Universal would not ordinarily be under any obligation to defend him or his estate in a civil action. However, by ruling that Universal’s policy covered Pinto at the time of the 30 April Accident, the court’s order implicated Universal’s duty to defend Pinto’s estate in this lawsuit and thus affected a substantial right. Therefore, Universal’s appeal is properly before us.

II. Standing

[2] We must next address whether the Smiths or Erie possess standing to seek a declaration as to the liability insurance coverage obligations owed to Pinto’s estate in connection with the 30 April Accident. The Smiths argue that they have standing as persons whose “rights, status or other legal relations” are affected by the operation of N.C. Gen. Stat. § 20-75.1. Universal contends, however, that the Smiths lack standing because “[i]t is the effect of the conditional delivery statute on [Pinto] and VAW which is at issue, not the Smiths.” We agree that the Smiths do not possess standing.

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North Carolina's Uniform Declaratory Judgment Act provides that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." N.C. Gen. Stat. § 1-253 (2017). "Before a declaratory judgment can be had, however, there must exist a real controversy of a justiciable nature." *DeMent v. Nationwide Mut. Ins. Co.*, 142 N.C. App. 598, 601, 544 S.E.2d 797, 799 (2001) (citation and quotation marks omitted). N.C. Gen. Stat. § 1-254 sets out the following criteria with regard to when persons are entitled to declaratory relief:

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.

N.C. Gen. Stat. § 1-254 (2017).

This Court has stated that "[a] declaratory judgment may be used to determine the construction and validity of a statute, but the plaintiff must be *directly and adversely* affected by the statute." *Wake Cares, Inc. v. Wake Cty. Bd. of Educ.*, 190 N.C. App. 1, 11, 660 S.E.2d 217, 231 (2008), *aff'd*, 363 N.C. 165, 675 S.E.2d 345 (2009) (citation and quotation marks omitted) (emphasis added). With respect to contractual rights, we have held that "[w]hen a person is a third party to a contract, standing to seek a declaration as to the extent of coverage under an insurance policy requires that the party seeking relief have an enforceable contractual right under the insurance agreement." *Whitaker v. Furniture Factory Outlet Shops*, 145 N.C. App. 169, 174, 550 S.E.2d 822, 825 (2001) (citation and quotation marks omitted).

In *DeMent*, the plaintiff sustained injuries resulting from a car accident where the driver of the other vehicle failed to stop at a stop sign. *DeMent*, 142 N.C. App. at 599, 544 S.E.2d at 798. After the tortfeasor's insurer refused to pay for the plaintiff's medical expenses, the plaintiff sought a declaratory judgment construing the insurance policy at issue. We held that the plaintiff lacked standing, concluding that "[b]ecause the benefit running to [the] plaintiff by reason of the provision is merely incidental, he is without standing as a third-party beneficiary to seek enforcement of the covenant or a declaratory judgment as to its terms." *Id.* at 605, 544 S.E.2d at 801.

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Whitaker involved a petitioner who loaned his motorcycle to Furniture Factory Outlet Shops (“Furniture Factory”) to be used as a display in order to attract business to the store. *Id.* at 171, 550 S.E.2d at 823. The motorcycle was subsequently stolen from the store’s premises. Following the theft, the petitioner filed a claim for the loss of his motorcycle with Furniture Factory’s insurer, and the insurer denied the claim. The petitioner then sought a declaratory judgment that his loss was covered under the store’s insurance policy. *Id.* This Court held that the petitioner lacked standing to seek a declaratory judgment, stating as follows:

As in *DeMent*, the petitioner in this case is an incidental beneficiary to the insurance policy, and does not have a contractual right under N.C. Gen. Stat. § 1-253, and therefore, does not have standing. . . . Without a judgment against Furniture Factory, petitioner does not have an enforceable contractual right under the insurance policy. As a result, petitioner does not have standing to bring this action directly against respondent.

Id. at 175, 550 S.E.2d at 825-26 (quotation marks omitted).

In the present case, the Smiths were not named insureds under any of the insurance policies that potentially provided liability coverage to Pinto for his operation of the Beetle at the time of the 30 April Accident.⁶ Thus, they lack standing to seek a declaration as to the extent to which coverage exists under those policies.

Nor do the Smiths possess standing to seek a determination as to whether N.C. Gen. Stat. § 20-75.1 applies to this case. As noted above, N.C. Gen. Stat. § 20-75.1 sets out the circumstances under which a conditionally delivered vehicle remains covered by a dealership’s liability insurance policy in cases where the purchaser has not yet obtained financing for the purchase of the vehicle. The statute does not address the rights of third-party accident victims. Consequently, the Smiths are not “directly and adversely affected” by N.C. Gen. Stat. § 20-75.1 as would be required in order for them to possess standing to seek a declaration as to the statute’s applicability to these facts. *Wake Cares*, 190 N.C. App. at 11, 660 S.E.2d at 231. For these reasons, we conclude that the Smiths lack standing to seek a declaratory judgment in this action.

6. Nor do the Smiths make any argument that they were third-party beneficiaries under these policies.

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[3] Our determination that the Smiths do not possess standing, however, does not end our standing analysis. Erie has also asserted a claim seeking a declaratory judgment as to its coverage obligations with regard to the 30 April Accident.

N.C. Gen. Stat. § 1-257 states, in pertinent part, as follows:

[A] controversy between insurance companies, arising either by direct action or by joinder or intervention, with respect to which of two or more of the insurers is liable under its particular policy and the insurers' respective liabilities and obligations, constitutes a justiciable issue and the court should, upon petition by one or more of the parties to the action, render a declaratory judgment as to the liabilities and obligations of the insurers.

N.C. Gen. Stat. § 1-257 (2017).

Here, Erie is seeking a declaratory judgment as to its obligations in connection with the underlying tort action brought by the Smiths. N.C. Gen. Stat. § 1-257 expressly provides that such a controversy between insurance carriers "constitutes a justiciable issue" warranting the issuance of a declaratory judgment. Therefore, we are satisfied that Erie possesses standing to seek a declaratory judgment in order to determine the amount of coverage, if any, provided by its policy with regard to the 30 April Accident.

III. Joinder of Necessary Parties

[4] Although we have determined that Erie possesses standing to seek a declaratory judgment in this action, we nevertheless conclude that the trial court erred in ruling on Erie's claim for declaratory relief because of the absence of necessary parties to the litigation. North Carolina Rule of Civil Procedure 19(b) provides as follows:

The court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.

N.C. R. Civ. P. 19(b).

This Court has held that "[a] necessary party is one whose presence is required for a complete determination of the claim, and is one whose

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interest is such that no decree can be rendered without affecting the party. In other words, a necessary party is one whose interest will be directly affected by the outcome of the litigation.” *Begley v. Emp’t Sec. Comm.*, 50 N.C. App. 432, 438, 274 S.E.2d 370, 375 (1981) (internal citations and quotation marks omitted). “When there is an absence of necessary parties, the trial court should correct the defect *ex mero motu* upon failure of a competent person to make a proper motion.” *Rice v. Randolph*, 96 N.C. App. 112, 113, 384 S.E.2d 295, 297 (1989) (citation omitted). Furthermore, “[a] judgment which is determinative of a claim arising in an action in which necessary parties have not been joined is null and void.” *Id.*

Our appellate courts have previously applied this principle in the context of declaratory judgment actions. *See, e.g., N.C. Monroe Constr. Co. v. Guilford Cty. Bd. of Educ.*, 278 N.C. 633, 640, 180 S.E.2d 818, 822 (1971) (vacating declaratory judgment that invalidated award of construction contract because party awarded contract was “a necessary party in a proceeding to declare its contract with the defendant invalid and the court below could not properly determine the validity of that contract without making Barker-Cochran a party to the proceeding”); *Rice*, 96 N.C. App. at 114, 384 S.E.2d at 297 (“We believe that a dispute as to the extinguishment of a subdivision easement . . . cannot be resolved without the joinder of the grantor, or his heirs, who retain fee title to the soil[.]” (internal citations omitted)).

In the present case, it is clear that at all relevant times both VAW and VW Credit were operating as if VAW was the owner of the Beetle. But it is undisputed that the vehicle was instead owned by VW Credit. Thus, with regard to Pinto’s attempt to purchase the Beetle on 30 April 2016, VAW was asking VW Credit to provide financing for the sale of a vehicle that VW Credit actually owned and as to which VAW appears to have had no legally recognized interest. Nevertheless, for reasons that are not apparent from the record, neither VW Credit nor any of its insurers were ever made parties to this lawsuit. Given VW Credit’s status as the owner of the Beetle at the time of the 30 April Accident, no determination as to the insurance coverage available to Pinto’s estate can be made without the joinder as parties to this action of VW Credit itself and/or any of its insurers who provided liability coverage to it that may apply to the accident.

Therefore, we must vacate the trial court’s order and remand this case for joinder of these necessary parties. *See In re Foreclosure of a Lien by Hunter’s Creek Townhouse Homeowners Assoc., Inc.*, 200 N.C. App. 316, 319, 683 S.E.2d 450, 453 (2009) (vacating and remanding trial

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court's order in declaratory judgment action where court "should have intervened *ex mero motu*" to ensure joinder of a necessary party).

Conclusion

For the reasons stated above, we vacate the trial court's 13 April 2017 order and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges TYSON and INMAN concur.

STATE OF NORTH CAROLINA
v.
EDWARD M. ALONZO, DEFENDANT

No. COA17-1186

Filed 21 August 2018

1. Sexual Offenses—felonious child abuse by sexual act—jury instructions—pattern instructions inconsistent with case law

Although the definition of "sexual act" in the Pattern Jury Instructions for felonious child abuse by sexual act was inconsistent with controlling case law, the trial court's error in utilizing the inaccurate Pattern Jury Instructions in defendant's case did not rise to the level of plain error because defendant's argument regarding inconsistent verdicts was not convincing that, absent the error, the jury probably would have reached a different result.

2. Evidence—relevance—prejudicial and probative value—unrelated sexual assault

In defendant's trial for sexual offenses committed against his daughter, the trial court did not err by excluding defendant's proposed testimony concerning the rape of his other daughter by a neighbor, under Rules of Evidence 401 and 403. Defendant failed to show how the testimony would have a logical tendency to prove that he did not molest his daughter or how his wife's reporting of the rape by the neighbor would make her more likely to report the molestation by her husband; further, the testimony likely would have confused the jury.

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Judge ARROWOOD concurring in the result only.

Appeal by Defendant from judgment entered 11 January 2017 by Judge Gale M. Adams in Cumberland County Superior Court. Heard in the Court of Appeals 5 June 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Ellen A. Newby, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

MURPHY, Judge.

Defendant, Edward M. Alonzo, appeals his convictions of taking indecent liberties with a child and felony child abuse. These convictions result from the sexual conduct Defendant inflicted on his daughter, Sandy,¹ while the family resided in Fayetteville between 1990-1993. At issue is whether a trial court commits plain error by giving jury instructions that follow the present Pattern Jury Instruction, but are not in accordance with current law. Further, here, we must determine whether the trial court erred in excluding portions of Defendant's testimony under Rules 401 and 403. N.C.G.S. § 8C-1, Rules 401, 403. Upon review, we find no plain error, and no error, respectively.

BACKGROUND

Defendant began sexually molesting Sandy when she was only four years old. This assault continued as their military family moved throughout the United States and Europe. Despite Sandy informing her mother, Defendant's behavior persisted.

In 2012, having obtained the age of majority, Sandy contacted local, federal, and military authorities across the country regarding the molestation she endured as a child. When Sandy contacted the Cumberland County Sheriff's Department, where the family resided in Fayetteville from approximately 1990-1993, they ultimately informed her that there is no statute of limitations for felonies in North Carolina.²

1. We refer to Defendant's daughter by a pseudonym as she was under the age of 18 at the time of the offenses.

2. *State v. Taylor*, 212 N.C. App. 238, 249, 713 S.E.2d 82, 90 (2011) ("In [North Carolina] no statute of limitations bars the prosecution of a felony." (citation omitted)).

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A grand jury issued superseding indictments on 3 January 2017 against Defendant for taking indecent liberties with a child, felonious child abuse, and first degree statutory sexual offense. At trial, Ms. Alonzo (Defendant's ex-wife and Sandy's mother) testified that she witnessed Defendant molest Sandy sometime between December 1990 and January 1991, when Defendant was home on compassionate leave from the Army. Defendant attempted to testify that the reason for his compassionate leave was the rape of his other daughter by a neighbor. However, the trial court disallowed this testimony, deeming it both irrelevant and more prejudicial than probative. At the close of the trial, the judge instructed the jury using the Pattern Jury Instructions, including, *inter alia*, N.C.P.I.–Crim. 239.55B, the instruction for felonious child abuse.

On 11 January 2017, Defendant was convicted of taking indecent liberties with a child and felonious child abuse. The jury found him not guilty of first degree statutory sexual offense.³ Defendant timely appealed, focusing on the jury instructions and the trial court's decision to exclude portions of his proposed testimony.

ANALYSIS**A. Jury Instructions**

[1] At trial, Defendant failed to object to the instructions regarding the charge of felonious child abuse by sexual act in violation of N.C.G.S. § 14-318.4(a2) (1991).⁴ Therefore, the trial court's decision will only be overturned upon a finding of plain error. *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012).

"[T]he North Carolina plain error standard of review [for jury instructions] applies only when the alleged error is unpreserved[.]" *Id.* "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

The trial court instructed the jury that:

To find [Defendant] guilty of this offense the State must prove three things beyond a reasonable doubt: First, that

3. First degree statutory sexual offense is defined as "a sexual act with a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim." N.C.G.S. § 14-27.29(a) (2017).

4. For the purposes of this case, there is no substantive difference between N.C.G.S. § 14-318.4(a2) (1991) and the versions applied in the cases cited in this opinion.

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[Defendant] was the parent of [Sandy]. Second, that at the time [Sandy] had not yet reached her 16th birthday. Third, that [Defendant] committed a sexual act upon [Sandy]. A sexual act is an immoral, improper or indecent act by [Defendant] upon [Sandy] for the purpose of arousing, gratifying sexual desire.

These instructions track, almost precisely, the language of the North Carolina Pattern Jury Instruction, N.C.P.I.–Crim. 239.55B, the suggested instructions for the charge of felonious child abuse. “[T]he preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions.” *Caudill v. Smith*, 117 N.C. App. 64, 70, 450 S.E.2d 8, 13 (1994) (citation omitted).

Defendant does not argue that the Pattern Jury Instruction is inapplicable to his case. Instead, Defendant takes issue with the language of the instruction and argues the definition of “sexual act” is incorrect, pointing to an inconsistency between the Pattern Jury Instruction and this Court’s precedent. While Defendant’s argument has merit, the error does not rise to the level of plain error here.

1. Inaccuracy of Pattern Jury Instruction

Defendant addresses a discrepancy between N.C.P.I.–Crim. 239.55B and our prior interpretation of a sexual act, as applied to N.C.G.S. § 14-318.4(a2). We have previously held that the definition of “sexual act” in N.C.G.S. § 14-318.4(a2) is the definition contained in N.C.G.S. § 14-27.1(4) (recodified as N.C.G.S. § 14-27.20(4)). *State v. Lark*, 198 N.C. App. 82, 88, 678 S.E.2d 693, 698 (2009). N.C.G.S. § 14-27.20(4) defines “sexual act” as:

cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person’s body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes.

The State argues, and Defendant concedes, that a later decision of this Court diverges from this definition of sexual act, declining to extend the N.C.G.S. § 14-27.1(4) definition to N.C.G.S. § 14-318.4(a2). *State v. McClamb*, 234 N.C. App. 753, 758-59, 760 S.E.2d 337, 341 (2014) (citations omitted). As such, there is a conflict between our precedent. However, “when there are conflicting lines of opinions from this Court, we generally look to our earliest relevant opinion in order to resolve

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the conflict.” *State v. Meadows*, ___ N.C. App. ___, ___, 806 S.E.2d 682, 693 (2017), *cert. granted* ___, N.C. ___, 812 S.E.2d 847 (2018). As we are bound by our earlier decision in *Lark*, the State’s argument regarding *McClamb* is without merit.

As a result, there is inconsistency between N.C.P.I.–Crim. 239.55B and our controlling interpretation of “sexual act” as applied to N.C.G.S. § 14-318.4(a2). *See Lark*, 198 N.C. App. at 88, 678 S.E.2d at 698. While the Pattern Jury Instruction allows a broader categorization of what qualifies as a “sexual act,” our precedent defines the words more narrowly. *Compare id.*, with N.C.P.I.–Crim. 239.55B. We express concern about this split in definitions for “sexual act.” This divergence indicates the necessity of updating the Pattern Jury Instructions to be in accordance with our precedent. *Lark*, 198 N.C. App. at 88, 678 S.E.2d at 698; N.C.P.I.–Crim. 239.55B. The Pattern Jury Instruction’s definition of sexual act must conform with this Court’s definition in *Lark*.

As binding precedent supports Defendant’s claim of inaccurate jury instructions, we must now determine whether the trial court’s use of the Pattern Jury Instruction constituted plain error.

2. Prejudice

In deciding whether this error in the Pattern Jury Instruction rises to the level of plain error, we first hold that Defendant’s claim that “[t]he combination of the jury’s verdicts finding [Defendant] not guilty of sex offense and guilty of . . . the [child abuse] charge directly establishes” plain error is unconvincing. Defendant argues that the proper definition of sexual act for the felonious child abuse charge “would have mirrored” the instruction the jury received for sexual act in relation to Defendant’s first degree statutory sexual offense charge.⁵ Defendant alleges the not guilty verdict on the sexual offense charge demonstrates that the jury had reasonable doubt that Defendant penetrated Sandy, and, that had the *Lark* definition of sexual act been given for the child abuse instruction, Defendant would have been found not guilty of that crime as well. Defendant’s prejudice argument focuses on this alleged “inconsistency” between the jury’s verdicts.

5. The definition of “sexual act” given for the first degree statutory sexual offense charge was “any penetration, however slight, by an object into the genital opening of a person’s body.” The proper definition for sexual act in relation to the felonious child abuse charge is, in pertinent part, “penetration, however slight, by any object into the genital or anal opening of another person’s body.” *Lark*, 198 N.C. App. at 88, 678 S.E.2d at 698.

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However, as inconsistent verdicts are not prima facie evidence of error, and as we are not convinced a proper jury instruction would have rendered a different verdict, we hold that the trial court's instructions did not prejudice the jury. *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333; *State v. Mumford*, 364 N.C. 394, 398-401, 699 S.E.2d 911, 914-16 (2010).

While verdicts that are “inconsistent and contradictory” indicate error, “verdicts that are merely inconsistent” may be both grounded in logic and not erroneous. *Mumford*, 364 N.C. at 398-401, 699 S.E.2d at 914-16. To determine whether conflicting verdicts are “merely inconsistent,” or both “inconsistent and contradictory,” we must look to the relationship between the charges. *Id.* Erroneous jury decisions occur when contradictory verdicts are “mutually exclusive,” one guilty finding eliminating the possibility of an accurate guilty verdict on the other charges. *Id.* (citations omitted). However, the charges Defendant faced, indecent liberties with a child, felonious child abuse, and first degree statutory sexual offense, were not “mutually exclusive” because “guilt of one [did not] necessarily exclude[] guilt of the other[s].” *Id.* at 400, 699 S.E.2d at 915; see *State v. Farlow*, 336 N.C. 534, 444 S.E.2d 913 (1994) (establishing that the charges of indecent liberties with a child and first degree sexual offense are not mutually exclusive). Therefore, what Defendant proposes as inconsistencies within these jury verdicts, acquittal on the sexual offense charge, but guilty of the child abuse charge, does not rise to the level of plain error in the jury instructions. *Mumford*, 364 N.C. at 398-401, 699 S.E.2d at 914-16.

Further, we are not convinced the jury would reach a different result had the proper jury instruction been given. *Lark*, 198 N.C. App. at 88, 678 S.E.2d at 698; N.C.P.I.–Crim. 239.55B. “It is well established in North Carolina that a jury is not required to be consistent . . .” *State v. Rosser*, 54 N.C. App. 660, 661, 284 S.E.2d 130, 131 (1981) (citations omitted). Since 1925, our Supreme Court has found validity in inconsistent jury verdicts, stating that:

The offenses are designated in the statute separately, and while the jury would have been fully justified in finding the defendant guilty on both counts, under the evidence in this case, their failure to do so does not, as a matter of law, vitiate the verdict

State v. Sigmon, 190 N.C. 684, 691, 130 S.E. 854, 857 (1925). Furthermore, throughout North Carolina jurisprudence, our appellate courts have reaffirmed the legitimacy of inconsistent jury verdicts. *Rosser*, 54 N.C. App. at 661, 284 S.E.2d at 131; *State v. Davis*, 214 N.C. 787, 71 S.E.2d 104

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(1939) (upholding jury verdicts finding Defendant guilty of transporting liquor for the purpose of selling it, but not guilty of possessing liquor).

As precedent dictates the validity of inconsistent verdicts, Defendant's argument of inconsistency indicating plain error fails to satisfy us "that absent the error, the jury probably would have reached a different result." *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. Therefore, we hold that the trial court's utilization of the Pattern Jury Instruction does not rise to the level of plain error.

Lark's definition of "sexual act" as applied from N.C.G.S. § 14-27.1(4) to N.C.G.S. § 14-318.4(a2) remains binding on our review and results in a split between the Pattern Jury Instruction and current law. *Lark*, 198 N.C. App. at 88, 678 S.E.2d at 698. However, the trial court's decision to follow the Pattern Jury Instruction did not rise to the level of plain error as Defendant failed to demonstrate that the jury would have reached a different verdict had correct jury instructions been given, with the proper definition of "sexual act." *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697.

B. Exclusion of Testimony

[2] Defendant also appeals the trial court's exclusion of his proposed testimony regarding the sexual assault of his other daughter by a neighbor. Defendant alleges that his testimony concerning the sexual assault of his other daughter by a neighbor operates as substantive evidence of the fact that he did not sexually assault Sandy during his compassionate leave.⁶ Defendant also alleges that this proposed testimony should have been allowed to impeach the testimony of Ms. Alonzo relating to her having witnessed Defendant sexually assault Sandy during his compassionate leave. On appeal, Defendant maintains that his testimony informing the jury of the sexual assault of his other daughter proves that he "would have been sufficiently deterred" from molesting Sandy during that same time period as "Ms. Alonzo [was] watching him like a hawk." Further, Defendant alleges that his testimony would "discredit[] Ms. Alonzo's testimony" that she saw him sexually assault Sandy, making her explanation for not contacting the police after witnessing his acts "less convincing."

6. At trial, Defendant argued that this part of his testimony would show that "he wouldn't have molested [Sandy] in Fayetteville because of the trauma, because of the all of the things that the family would have had to have gone through and that new ordeal, that new situation would have made him less likely to molest [Sandy]."

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The trial court found Defendant's proposed testimony irrelevant under N.C.G.S. § 8C-1, Rule 401, and alternatively found that it did not satisfy the balancing test of N.C.G.S. § 8C-1, Rule 403. On appeal, the trial court's Rule 401 decisions are "given great deference." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation omitted). A trial court's ruling under Rule 403's balancing test will not be disturbed absent an abuse of discretion. *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008).

1. Substantive Use**a. Rule 401**

Defendant claims that his testimony regarding the unrelated sexual assault of his other daughter offers substantive, relevant evidence that he did not sexually molest Sandy during his compassionate leave. "In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (internal quotation marks and citation omitted) (2000). Defendant, however, fails to establish how his proposed testimony concerning the sexual assault of his other daughter by another person would have the "logical tendency to prove" he was therefore less likely to assault Sandy. *Id.* As Defendant's arguments fail to establish this alleged correlation, his proposed testimony does not "have a logical tendency to prove" that Defendant would not have sexually molested Sandy. *Id.*; N.C.G.S. § 8C-1, Rule 401. As we give "great deference" to the trial court, we decline to disturb the trial court's Rule 401 relevancy ruling. *Dunn*, 162 N.C. App. at 266, 591 S.E.2d at 17.

b. Rule 403

Further, assuming *arguendo* that Defendant's evidence regarding the sexual assault of his other daughter was relevant, the trial court did not abuse its discretion in excluding the testimony. *Whaley*, 362 N.C. at 160, 655 S.E.2d at 390; N.C.G.S. § 8C-1, Rule 403. "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Rule 403 requires the trial court to balance the prejudicial and probative value of any evidence, admitting only evidence that benefits rather than hinders the jury's deliberation. N.C.G.S. § 8C-1, Rule 403. The testimony concerning the sexual assault of another child by an unrelated, third-party had the potential to confuse the jury, outweighing any probative value, and it was therefore not an abuse

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of discretion for the trial court to exclude Defendant's testimony as it related to the production of allegedly substantive evidence.⁷

2. Impeachment Use

At trial and on appeal, Defendant also maintains that his testimony could have been used to impeach Ms. Alonzo's testimony that he sexually assaulted Sandy.

a. Rule 401

Defendant asserts that because Ms. Alonzo reported the sexual assault of their other daughter by a neighbor, she therefore would have reported any assault she witnessed him commit. Defendant further alleges that because Ms. Alonzo did not file any reports, the jury could have therefore determined there was no sexual assault. We agree with the State that Ms. Alonzo turning in a neighbor for sexual assault is entirely different, psychologically and emotionally, than turning in her husband. Without an established correlation between turning in neighbors and husbands for sexual assault, Defendant's proposed testimony does not "have a logical tendency to prove" that Ms. Alonzo was incorrect or untruthful in her testimony. *Griffin*, 136 N.C. App. at 550, 525 S.E.2d at 806. We decline to disturb the trial court's determination on the testimony's relevancy.

b. Rule 403

Further, the trial court did not abuse its discretion in excluding this testimony under Rule 403. *Whaley*, 362 N.C. at 160, 655 S.E.2d at 390; N.C.G.S. § 8C-1, Rule 403. Rule 403's balancing test mandates the exclusion of prejudicial or otherwise inapplicable evidence when "its probative value is substantially outweighed" by its prejudicial or inapplicable nature. N.C.G.S. § 8C-1, Rule 403. As previously stated, testimony concerning the sexual assault of another child by an unrelated, third-party had the potential to confuse the jury, outweighing any probative value. It was not an abuse of discretion for the trial court to exclude Defendant's proposed testimony as it related to the impeachment of Ms. Alonzo's testimony.

CONCLUSION

The current Pattern Jury Instruction concerning the definition of "sexual act" in N.C.G.S. § 14-318.4(a2) requires immediate attention by

7. The trial court stated that "I don't find that [the proposed testimony] is more probative than would be, as the State has indicated, confusing to the jury why we're even delving into issues regarding the other daughter."

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the North Carolina Conference of Superior Court Judges Committee on Pattern Jury Instructions or our Supreme Court. Clarity is necessary so that the law may be uniformly applied in all trials throughout the State. Here, however, the trial court's decision to utilize N.C.P.I.–Crim. 239.55B did not rise to the level of plain error. Additionally, we uphold the trial court's decision to exclude portions of Defendant's proposed testimony regarding the unrelated sexual assault of his other daughter by another person under Rule 401 and find it was not an abuse of discretion for the trial court to exclude this testimony under Rule 403.

NO PLAIN ERROR IN PART; NO ERROR IN PART.

Judge CALABRIA concurs.

Judge ARROWOOD concurs in result only.

STATE OF NORTH CAROLINA
v.
JEFFREY KEITH HOBSON

No. COA17-1052

Filed 21 August 2018

1. Stalking—jurisdiction—subject matter—indictment—presentment

Although defendant argued that the trial court lacked subject matter jurisdiction over a misdemeanor charge of stalking because the charge was not initiated by a presentment prior to indictment, the amended record on appeal contained a certified copy of the presentment.

2. Evidence—stalking prosecution—domestic violence protective order—redacted—prejudice analysis

The trial court did not abuse its discretion in a stalking prosecution by admitting domestic violence protective orders and related findings where the trial court redacted the orders and gave limiting instructions.

3. Evidence—stalking—testimony of incidents with another woman—plain error analysis

The trial court did not plainly err in a stalking prosecution by admitting the testimony of defendant's prior girlfriend regarding his

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assault on her, and relating her communications with the prosecuting victim, where the challenged portions of the prior girlfriend's testimony were relevant not only to show defendant's propensity for stalking but to show that the prosecuting victim was in reasonable fear of defendant.

4. Evidence—photographs of firearms, weapons, surveillance equipment—irrelevant—prejudice outweighed by other evidence

In a stalking prosecution, photographs of legally owned firearms, ammunition, and surveillance equipment found in defendant's home were irrelevant, and the probative value of the evidence was outweighed by the danger of unfair prejudice. The trial court abused its discretion in admitting the photographs; however, in light of the overwhelming other evidence, the admission of the photographs did not amount to prejudicial error.

5. Stalking—motion to dismiss—sufficiency of the evidence—defendant as perpetrator

The trial court did not err by denying defendant's motion to dismiss a charge of misdemeanor stalking where defendant contended that he was not the perpetrator. There was testimony from defendant's previous girlfriend that he had mailed derogatory flyers.

Appeal by defendant from judgment entered 10 March 2017 by Judge Imelda J. Pate in New Hanover County Superior Court. Heard in the Court of Appeals 2 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney Generals Stuart M. Saunders and Teresa M. Postell, for the State.

Lisa S. Costner for defendant.

ELMORE, Judge.

Defendant Jeffrey Keith Hobson appeals from judgment entered upon a jury verdict finding him guilty of misdemeanor stalking. On appeal, defendant raises five assignments of error related to the trial court's subject-matter jurisdiction; its admission of certain evidence, including civil domestic violence protective orders, portions of defendant's ex-girlfriend's testimony, and various photographs; and its denial of his motion to dismiss.

Although the trial court may have abused its discretion in admitting into evidence approximately twenty-eight photographs of firearms,

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ammunition, and surveillance equipment found throughout defendant's home, we nevertheless conclude that defendant received a fair trial, free from prejudicial error.

Background

The evidence at trial tended to show that defendant and the victim, Lorrie, were in a dating relationship for approximately four to five months beginning in late 2009. The relationship was not serious or exclusive, and it ended when defendant moved from Wilmington to Greensboro in early 2010.

In October 2010, Lorrie began working at Gold's Gym in Wilmington. When defendant moved back to Wilmington in early 2011, he began making persistent and unwelcome attempts to reconnect with Lorrie, which included repeatedly coming to her workplace and staring at her, calling and texting her, leaving a note on her vehicle, and sending derogatory letters about Lorrie to her father and boyfriend. When Lorrie's ex-husband asked defendant to leave her alone, defendant indicated that "he would make [her] pay and he would not leave [her] alone." Defendant was eventually banned from and escorted out of Gold's Gym by law enforcement.

In February 2012, Lorrie filed a complaint for and obtained a civil domestic violence protective order (DVPO) against defendant pursuant to N.C. Gen. Stat. § 50B. The DVPO provided that defendant not harass or interfere with Lorrie or her children, that he stay away from Lorrie's residence and workplace, and that he surrender all firearms in his possession to law enforcement. In February 2013, Lorrie sought and was granted a renewal of the DVPO for an additional twelve months based on her continued fear of defendant as well as defendant's conduct in approaching Lorrie and her children at a Halloween outing in 2012, while the initial DVPO was still in effect, to ask "if [she] was still mad at him." Defendant was present at both the initial hearing in 2012 and the renewal hearing in 2013, and redacted versions of the DVPOs as well as the filings related thereto were admitted into evidence at trial. Lorrie did not seek an additional renewal of the DVPO, which expired in February 2014.

In October 2014, a deputy with the New Hanover County Sheriff's Office responded to a home "in reference to somebody stating that they had received a letter . . . in the mail that appeared to be a flyer for prostitution." The flyer, which had been mailed to countless residents of New Hanover County, stated that Lorrie was a prostitute with sexually

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transmitted diseases, and it included her photograph, home address, cell phone number, work address, and work number. Lorrie told law enforcement that she suspected defendant was responsible for the flyers.

Defendant's ex-girlfriend, Holly, testified that she began a dating relationship with defendant in 2010, and he moved into her Wilmington home in May 2011. Holly was aware of defendant's attempts to reconnect with Lorrie. According to Holly, defendant wanted to find out why Lorrie had stopped seeing him, he was angry that Lorrie would not accept his calls, and he expressed a hatred for Lorrie and a desire to make her miserable; defendant "wanted revenge" and "he said [Lorrie] would deserve whatever she got." Sometime after Lorrie obtained the DVPO against defendant, defendant showed Holly a copy of the flyer concerning Lorrie, told Holly that he intended to mail the flyers, and asked Holly for the addresses of people in her neighborhood. Defendant also told Holly "not to say anything and to forget that [she] ever saw it," which Holly stated she interpreted as a threat.

Holly further testified that in January 2013, defendant fractured her nose during an argument about defendant's inappropriate communications with other women. Holly pressed assault charges against defendant, but later requested that the charges be dismissed. Holly explained that she was "afraid that if [she] continued with the charges that [she] would be punished somehow," that defendant was embarrassed and angry about being arrested for assault, and that defendant told her "he would never be arrested again" and "he would not be taken alive." Holly thereafter discovered a stack of the flyers concerning Lorrie among defendant's belongings, and she took one as "[she] was afraid that the same thing would have been done to [her], and [she] wanted to have proof of what [defendant] was capable of." Holly texted Lorrie about the assault and warned Lorrie to be careful, but she did not mention the flyers. Holly did not submit her copy of the flyer to law enforcement until October 2014, after the others had been mailed.

In December 2014, law enforcement officers executed a search warrant at defendant's residence. Firearms, ammunition, and surveillance equipment were located throughout the home, and approximately twenty-eight photographs of those items were admitted into evidence at trial. No white envelopes, American flag stamps, or images or other documents depicting Lorrie as a prostitute were found in the home.

At the conclusion of the State's evidence, defendant moved to dismiss the charge on the basis that "the State ha[d] failed on elements of the crime." The trial court denied the motion. Defendant did not present

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any evidence on his behalf but renewed his motion to dismiss, which the trial court again denied. The trial court then charged the jury as follows:

If you find from the evidence beyond a reasonable doubt that on or about the alleged dates the defendant willfully on more than one occasion harassed or engaged in a course of conduct directed at the victim without legal purpose, and that the defendant at that time knew or should have known that the harassment or course of conduct would cause a reasonable person to fear for that person's safety or the safety of that person's immediate family, or would cause a reasonable person to suffer substantial distress by placing that person in fear of death or bodily injury or continued harassment, it would be your duty to return a verdict of guilty.

If you do not so find, or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Following the guilty verdict, the trial court sentenced defendant to 75 days' imprisonment, suspended on the condition that he serve 60 months' supervised probation. The trial court also ordered that defendant serve 18 days in the New Hanover County jail and pay \$195.00 in costs as well as a \$2,000.00 fine. Defendant appeals.

Discussion

On appeal, defendant contends the trial court (I) lacked subject-matter jurisdiction over the misdemeanor charge of stalking; (II) abused its discretion in admitting Lorrie's DVPOs against defendant into evidence; (III) erred in failing to exclude from evidence certain portions of Holly's testimony; (IV) abused its discretion in admitting into evidence numerous photographs of firearms, ammunition, and surveillance equipment located throughout defendant's home; and (V) erred in denying defendant's motion to dismiss the charge for insufficiency of the evidence.

I. Subject-Matter Jurisdiction

[1] As an initial matter, defendant asserts that the trial court lacked subject-matter jurisdiction over the misdemeanor charge of stalking "where the charge was not initiated by a grand jury presentment prior to indictment."

The State is required to prove subject-matter jurisdiction in the trial court beyond a reasonable doubt. *State v. Batdorf*, 293 N.C. 486, 494,

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238 S.E.2d 497, 502 03 (1977). When the record on appeal affirmatively shows a lack of subject-matter jurisdiction in the trial court, this Court will arrest judgment or vacate any order entered without authority. *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 836 (1993) (citation omitted). “Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal.” *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted).

In the instant case, a grand jury indicted defendant for the offense of stalking pursuant to N.C. Gen. Stat. § 14-277.3A, which provides that “[a] violation of this section is a Class A1 misdemeanor.” N.C. Gen. Stat. § 14-277.3A(d) (2017). While “the district court division has exclusive, original jurisdiction for the trial of criminal actions . . . below the grade of felony, and the same are hereby declared to be petty misdemeanors,” N.C. Gen. Stat. § 7A-272(a) (2017), the superior court has jurisdiction to try a misdemeanor “[w]hen the charge is initiated by presentment,” N.C. Gen. Stat. § 7A-271(a)(2) (2017).

A presentment is a written accusation by a grand jury, made on its own motion and filed with a superior court, charging a person . . . with the commission of one or more criminal offenses. A presentment does not institute criminal proceedings against any person, but the district attorney is obligated to investigate the factual background of every presentment returned in his district and to submit bills of indictment to the grand jury dealing with the subject matter of any presentments when it is appropriate to do so.

N.C. Gen. Stat. § 15A-641(c) (2017). Simply stated, “a presentment amounts to nothing more than an instruction by the grand jury to the public prosecuting attorney to frame a bill of indictment.” *State v. Wall*, 271 N.C. 675, 682, 157 S.E.2d 363, 368 (1967) (citation omitted).

Defendant contends no evidence in the record on appeal shows a presentment was filed with the superior court in accordance with N.C. Gen. Stat. § 15A-641(c). However, the amended record contains a certified copy of the presentment issued by the grand jury on 15 December 2014 and filed with the superior court on 28 January 2015. Thus, because the stalking charge was properly initiated by a presentment, we conclude that the superior court had subject-matter jurisdiction over the misdemeanor pursuant to N.C. Gen. Stat. § 7A-271(a)(2). See *Petersilie*, 334 N.C. at 178, 432 S.E.2d at 837 (“When the record is amended to add the presentment, it is clear the superior court had jurisdiction[.]”). Defendant’s argument is dismissed.

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II. Domestic Violence Protective Orders

[2] Defendant next contends the trial court abused its discretion in admitting the DVPOs and filings related thereto into evidence. He asserts that the findings of fact contained in the DVPOs had unfairly prejudiced defendant and “would have been confusing to the jury as to the issues” to be determined at trial.

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2017). Whether the probative value of relevant evidence is substantially outweighed by “the danger of unfair prejudice, confusion of the issues, or misleading the jury” such that the evidence should be excluded is a determination within the trial court’s sound discretion. *State v. Hyde*, 352 N.C. 37, 54-55, 530 S.E.2d 281, 293 (2000) (quoting N.C. Gen. Stat. § 8C-1, Rule 403 (1999)). “Such a decision may be reversed for abuse of discretion only upon a showing that the trial court’s ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.” *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992) (citations, quotation marks, and brackets omitted).

Prior to trial in the instant case, defendant made an oral motion *in limine* to exclude the DVPOs from evidence. Defendant specifically objected to “anything going beyond just evidence that the [DVPO] was entered by the District Court Judge,” asserting that it “would not give the defendant a fair opportunity to defend himself if we have put before the jury judicial findings. The jury may be confused and say, ‘Well, a judge in District Court found that happened, so we’re bound by that.’” In response, the State emphasized that defendant had been present for and given an opportunity to be heard at both DVPO hearings; that the elements of the stalking offense required proof that a reasonable person in the victim’s circumstances would fear for her safety; and that the history between defendant and Lorrie as evidenced by and described within the DVPOs was therefore directly relevant to a fact of consequence at trial.

We agree the DVPOs were relevant to show defendant’s course of conduct as well as his motive to commit the offense of stalking. *See State v. Morgan*, 156 N.C. App. 523, 526-27, 577 S.E.2d 380, 384 (2003) (holding that evidence of prior and expired DVPOs was admissible to show defendant’s intent to kill). After reviewing the DVPOs, the trial court redacted those portions it found to be unfairly prejudicial to defendant, and only the redacted versions were admitted into evidence

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and published to the jury. As to defendant's argument that the jury was highly likely to regard the findings contained in the DVPOs as true and binding simply because they had been handwritten by a district court judge, the trial court's instructions to the jury included the following relevant excerpts:

Members of the jury, all of the evidence has been presented. It is now your duty to decide from this evidence what the facts are.

The defendant is presumed innocent. The State must prove to you that the defendant is guilty beyond a reasonable doubt.

You are the sole judges of the weight to be given any evidence.

The law requires the presiding judge to be impartial. You should not infer from anything that I have done or said that the evidence is to be believed or to be disbelieved, that a fact has been proven, or what your findings ought to be. It is your duty to find the facts and render a verdict reflecting the truth.

Given that the trial court redacted the DVPOs and properly instructed the jury regarding the State's burden of proof as well as the jury's duty "to find the facts," we conclude that the trial court did not abuse its discretion in admitting the DVPOs and related filings into evidence.

III. Rule 404(b) Testimony

[3] Defendant next contends the trial court erred in failing to exclude Holly's testimony that defendant had assaulted her in the past, that she was afraid of defendant, and that defendant told Holly "he would never be arrested again" and "he would not be taken alive." Defendant asserts that this testimony was only relevant to show propensity, or that defendant was a "bad guy," and does not fit within an exception listed in Rule 404(b) of the Rules of Evidence.

At the outset, we note that defendant filed a motion *in limine* to exclude from evidence the fact that he had been charged with assaulting Holly, arguing that "the charge was dismissed by the State, having at this point little or no probative value." In response, the State represented to the trial court that it did not intend to introduce evidence of the charge or of defendant's arrest, but it did expect Holly to testify regarding the assault itself. The State argued that the testimony was directly relevant

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because it bore on the victim's reasonable fear of defendant. Defendant later withdrew his motion, explaining, "If the State is going to be allowed to . . . have [Holly] testify that there was an assault, then I want to get in the end result of that."

Defendant did not object during trial to any portion of Holly's testimony that he now challenges on appeal. Nevertheless, he contends the testimony should have been excluded by the trial court as it does not fit within any of the exceptions listed in Rule 404(b). He further argues that the testimony should have been excluded as unfairly prejudicial pursuant to Rule 403.

Unpreserved errors in criminal cases are reviewed for plain error only. N.C. R. App. P. 10(a)(4). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). That is, the defendant must prove that "absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (citation omitted).

Pursuant to Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2017). "It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* This list of permissible purposes is not exclusive, and "the fact that evidence cannot be brought within a listed category does not necessarily mean that it is inadmissible." *State v. Groves*, 324 N.C. 360, 370, 378 S.E.2d 763, 769 (1989) (citation, quotation marks, and brackets omitted). Rather, there is a general rule of inclusion regarding "relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

Here, the challenged portions of Holly's testimony were relevant not only to show defendant's propensity to commit the offense of stalking, but also established that the victim, Lorrie, was in reasonable fear of defendant. Holly testified to texting Lorrie about the assault and warning Lorrie to be careful, and that Holly herself was afraid of defendant. This portion of Holly's testimony demonstrates both that Lorrie had a legitimate basis for her fear of defendant and that her fear was reasonable

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as required by N.C. Gen. Stat. § 14-277.3A. Similarly, defendant's statements to Holly—that "he would never be arrested again" and "he would not be taken alive"—were made in reference to the assault and further illustrate a course of conduct that would cause a reasonable person to fear for her safety.

Under these circumstances, defendant has failed to show that the trial court plainly erred in admitting the challenged portions of Holly's testimony.

IV. Photographic Evidence

[4] Defendant next asserts that the trial court abused its discretion in admitting into evidence approximately twenty-eight photographs of firearms, ammunition, and surveillance equipment found throughout defendant's home during the execution of the search warrant. He contends that because "[t]here was no evidence of the use or presence of a firearm with regard to this offense, and no evidence that [defendant] used surveillance equipment in the commission of the crime of stalking," the probative value of the photographs was substantially outweighed by the danger of unfair prejudice.

Pursuant to Rule 403 of the Rules of Evidence, in determining whether to admit photographic evidence, the trial court must weigh the probative value of the photographs against the danger of unfair prejudice to defendant. *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Whether photographic evidence is admissible under Rule 403 is within the sound discretion of the trial court, and its ruling will not be reversed on appeal absent an abuse of discretion. *Id.*

In the instant case, the photographs of defendant's firearms, ammunition, and surveillance equipment—all of which defendant legally possessed at the time the search warrant was executed—were wholly irrelevant to the issue of whether defendant had committed the offense of stalking. We therefore agree with defendant that the probative value of the photographs was substantially outweighed by the danger of unfair prejudice, and the trial court should have exercised its discretion by excluding the photographs. However, in light of the overwhelming additional evidence presented at trial, we conclude defendant has failed to show that the admission of the photographs amounted to prejudicial error.

V. Motion to Dismiss

[5] In his final assignment of error, defendant challenges the trial court's denial of his motion to dismiss the charge of misdemeanor stalking

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where he contends the State “failed to prove that [defendant] was the person who created and mailed the inflammatory flyers.”

“When ruling on a defendant’s motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted). “This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33.

On appeal, defendant does not assert that the State failed to present substantial evidence of each element of the stalking offense; rather, his sole argument is that there was insufficient evidence of defendant being the perpetrator of the offense. According to defendant, the only evidence linking him to the flyer was Holly’s testimony, which he maintains was “inadmissible and prejudicial.”

As discussed in section III above, Holly’s testimony was not inadmissible or unfairly prejudicial to defendant. Moreover, her testimony was subject to cross-examination, during which Holly admitted to having been embarrassed defendant was trying to reconnect with Lorrie; that she and defendant had disputes regarding money and property after their relationship ended; that she owned a computer and printer; that she did not inform Lorrie or law enforcement about the flyer when she first discovered it; that her computer was never examined by law enforcement; and that she takes medications for mental health issues.

While defendant attempted at trial to raise doubt about the identity of the person who mailed the flyers—insinuating that Holly could have been the culprit—and although he challenges certain portions of Holly’s testimony on appeal, he raises no challenge to that portion of Holly’s testimony in which she stated defendant showed her a copy of the flyer, told her that he intended to mail them, and asked her for addresses, nor does he challenge Holly’s claim to have found a stack of the flyers among defendant’s belongings. We therefore conclude the State presented substantial evidence to support a conclusion that defendant was the perpetrator of the offense, and the trial court did not err in denying defendant’s motion to dismiss.

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Conclusion

Although we agree with defendant that the trial court abused its discretion under Rule 403 in admitting into evidence numerous photographs of firearms, ammunition, and surveillance equipment found throughout defendant's home, for the reasons stated herein, we conclude that defendant received a fair trial, free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges TYSON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
DONNA HELMS LEDBETTER

No. COA15-414-3

Filed 21 August 2018

1. Motor Vehicles—driving while impaired—statutory requirements—procedure to observe condition—oral notice

In a driving while impaired case, defendant did not show irreparable prejudice to the preparation of her case due to the magistrate's failure to inform her in writing of her right under N.C.G.S. § 20-38.4 to have witnesses appear at the jail to observe her condition. Although the magistrate did not fully comply with the statute's requirements, the magistrate did orally inform defendant of the right to have her condition observed, and defendant was allowed to make several phone calls to friends and family after being detained.

2. Motor Vehicles—driving while impaired—statutory requirements—detention—written findings

In a driving while impaired case, the Court of Appeals rejected defendant's argument that her motion to dismiss should have been granted on the basis that the magistrate violated N.C.G.S. § 15A-534 by accidentally deleting from his order written findings regarding his reasons for imposing a secured bond. Defendant failed to demonstrate irreparable prejudice to the preparation of her case where the trial court's findings, supported by competent evidence, showed that the magistrate considered the statutory factors before setting a secured bond and before ordering defendant to be held until a certain time unless released to a sober adult.

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3. Appeal and Error—driving while impaired—statutory violations—per se prejudice analysis

In a driving while impaired (DWI) case, defendant failed to show she was per se prejudiced by the magistrate’s statutory violations in the absence of any evidence the State deprived defendant of access to potential witnesses or an attorney, or any argument by defendant that evidence was gathered in violation of her constitutional or statutory rights and should have been suppressed. The Court of Appeals found no grounds to grant a writ of certiorari to review the denial of defendant’s motion to dismiss where defendant voluntarily pleaded guilty to DWI prior to analysis of her blood sample, she stipulated to a factual basis for the DWI, and she received the benefit of her plea bargain by having two drug charges dismissed.

Judge ARROWOOD concurring in the result.

Appeal by Donna Helms Ledbetter (“Defendant”) from judgment entered 27 October 2014 by Judge Jeffrey P. Hunt in Rowan County Superior Court. Originally heard in the Court of Appeals 8 October 2015, and reconsidered by opinion issued 6 December 2016. *State v. Ledbetter*, __ N.C. App. __, 794 S.E.2d 551 (2016). Upon remand from the Supreme Court of North Carolina by opinion issued 8 June 2018. *State v. Ledbetter*, __ N.C. __, 814 S.E.2d 39 (2018).

Attorney General Joshua H. Stein, by Assistant Attorneys General Christopher W. Brooks and Ashleigh P. Dunston, for the State.

Meghan A. Jones for defendant-appellant.

TYSON, Judge.

I. Background

The facts underlying this case are set forth in our previous opinion, *State v. Ledbetter*, 243 N.C. App. 746, 779 S.E.2d 164 (2015). The procedural history is contained in *State v. Ledbetter*, __ N.C. __, 814 S.E.2d 39 (2018). Pursuant to the Supreme Court’s instructions, we “exercise [our] discretion to determine whether [we] should grant or deny [D]efendant’s petition for writ of certiorari.” *Id.* at __, 814 S.E.2d at 43 (2018).

II. Writ of Certiorari

“A writ of *certiorari* is an extraordinary remedial writ[.]” *State v. Roux*, 263 N.C. 149, 153, 139 S.E.2d 189, 192 (1964) (citation omitted).

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“*Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown.” *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960).

“The decision concerning whether to issue a writ of certiorari is discretionary, and thus, the Court of Appeals *may* choose to grant such a writ to review . . . issues that are meritorious *but not* [for issues] for which a defendant has failed to show good or sufficient cause.” *State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016) (emphasis supplied and citation omitted).

In deciding whether to grant Defendant’s petition, Defendant’s arguments must demonstrate “good and sufficient cause” to support this Court’s exercise of its discretion to grant her petition and issue the writ of certiorari. *Id.*

[1] Defendant asserts the trial court prejudicially erred in denying her motion to dismiss, because the State violated N.C. Gen. Stat. § 20-38.4, N.C. Gen. Stat. § 15A-534, and *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988), when the magistrate: (1) failed to provide Defendant a written copy of Form AOC-CR-271, advising of her right to have witnesses observe her demeanor in jail; and, (2) failed to enter sufficient findings of fact to show Defendant was a danger to herself and others to justify imposing a secured bond pursuant to N.C. Gen. Stat. § 15A-534.

“Dismissal of charges for violations of statutory rights is a drastic remedy which should be granted sparingly. Before a motion to dismiss should be granted [. . .] it must appear that the statutory violation caused *irreparable prejudice* to the preparation of defendant’s case.” *State v. Labinski*, 188 N.C. App. 120, 124, 654 S.E.2d 740, 742-43 (emphasis original) (citation and internal quotation marks omitted), *review denied*, 362 N.C. 367, 661 S.E.2d 889 (2008).

With regard to Defendant’s first argument, the State concedes the magistrate did not comply with N.C. Gen. Stat. § 20-38.4 to inform Defendant “in writing of the established procedure to have others appear at the jail to observe [her] condition” and failing to require her “to list all persons [she] wishes to contact and telephone numbers on a form that sets forth the procedure for contacting the persons listed.” N.C. Gen. Stat. § 20-38.4 (2017).

The State argues Defendant cannot demonstrate “irreparable prejudice to the preparation of defendant’s case” because the magistrate orally informed Defendant of her right to have witnesses present to observe her condition. *Labinski*, 188 N.C. App. at 124, 654 S.E.2d at 742-43. In its order denying Defendant’s motion to dismiss, the trial court found:

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45. Magistrate Wyrick testified he did tell the defendant of her right to have individuals come to the detention center to observe her condition.

....

47. Once placed in the Rowan County Detention Center, the defendant was allowed to make phone calls to her mother (several calls), to her brother (1 call), to Kenneth Paxton and a girlfriend Alisha.

These findings of fact are supported by competent evidence in the record through the testimony of Magistrate Wyrick and Defendant's own testimony that she was able to, and did, in fact, make several phone calls from jail to friends and family. Defendant cannot demonstrate the statutory violation caused her to suffer any "irreparable prejudice to the preparation of defendant's case." *Id.*

[2] With regard to Defendant's second argument, she argues the magistrate violated N.C. Gen. Stat. § 15A-534, which requires a magistrate to record, "in writing," findings for imposing a secured bond upon a defendant, and to consider the factors listed under N.C. Gen. Stat. § 15A-534(c). N.C. Gen. Stat. 15A-534(a)-(c) (2017). Defendant contends the magistrate's failure to comply with these statutory obligations led to a deprivation of her right to gather evidence and witnesses on her behalf during a crucial time period following arrest.

Magistrate Wyrick testified he took into consideration Defendant's condition in deciding whether to impose a secured bond and he initially entered his reasons on his computer for imposing a secured bond into the "FINDINGS" section of Form AOC-CR-270. However, Magistrate Wyrick testified he accidentally deleted his reasons listed on Form AOC-CR-270 and they were replaced with the text and finding of "BLOOD TEST." Based upon the magistrate's testimony, the trial court found:

38. Magistrate Wyrick noted by writing "Blood Test" on [AOC-CR-270] that he found by clear[,] cogent[,] and convincing evidence that the defendant's physical or mental faculties were impaired and that she was a danger to herself, others or property if released.

39. Magistrate Wyrick ordered that the defendant be held until her physical and mental faculties were no longer impaired to the extent she presented a danger to herself, others or property *or released to a sober responsible adult.* (SE# 5) [Emphasis supplied]

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40. Magistrate Wyrick on the charges of No Operator's License, Simple Possession of Schedule II Controlled Substance and Simple Possession of Schedule IV Controlled Substance set a \$1,000 secured bond for the defendant. (SE# 6)

41. Magistrate Wyrick testified that he considered the factors set forth in 15A-534(c) in setting the defendant's bond, but he could not recall any specific facts upon which he relied in setting the secured bond.

42. In addition, Magistrate Wyrick ordered the defendant be held until 7 am on 01/02/13 *unless released to a sober adult*. (SE# 6) [Emphasis supplied]

Based upon these findings of fact, which are supported by competent evidence, Defendant has failed to show she was denied access to witnesses, her right to have witnesses observe her condition, or her right to collect evidence. Defendant has not demonstrated "irreparable prejudice to the preparation of [her] case" by the magistrate's statutory violations and failures to provide her with a copy of Form AOC-CR-271 or to make additional factual findings to justify imposing a secured bond under N.C. Gen. Stat. § 15A-534.

Defendant was informed of her right to have witnesses observe her, had the means and was provided the opportunity to contact potential witnesses. Additionally, the magistrate's detention order required Defendant to remain in custody for a twelve-hour period or until released into the custody of "a sober, responsible adult." Defendant was released into the custody of a sober acquaintance after spending only two hours and fifty-three minutes in jail, from 9:31 p.m. 1 January 2013 until 12:24 a.m. 2 January 2013.

[3] Defendant also argues she was *per se* prejudiced by the magistrate's statutory violations, pursuant to *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971). In *Hill*, the defendant was involved in a motor vehicle accident. *Id.* at 549, 178 S.E.2d at 463. After coming upon the scene of the accident, a police officer arrested the defendant for drunken driving after observing factors tending to indicate the defendant was appreciably impaired. *Id.* After his arrest, the defendant was taken to jail and administered a breathalyzer test. *Id.*, 178 S.E.2d at 464. Following the breathalyzer test, the evidence tended to show:

(1) that defendant was not 'permitted' to telephone his attorney until after the breathalyzer testing and photographic

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procedures were completed and the warrant was served; (2) that he called Mr. Graham, his attorney and brother-in-law, who came to the jail; (3) that Mr. Graham's request to see his client and relative was peremptorily and categorically denied; and (4) that from the time defendant was arrested about 11:00 p.m. until he was released about 7:00 a.m. the following morning only law enforcement officers had seen or had access to him.

Id. at 553, 178 S.E.2d at 466. The evidence also tended to show the defendant was only permitted one phone call. *Id.* at 550, 178 S.E.2d at 464. The Supreme Court of North Carolina held the denial of the defendant's statutory and constitutional right of access to his counsel was *per se* prejudicial and stated:

Before we could say that defendant was not prejudiced by the refusal of the jailer to permit his attorney to see him we would have to assume both the infallibility and credibility of the State's witnesses as well as the certitude of their tests. Even if the assumption be true in this case, it will not always be so. However, the rule we now formulate will be uniformly applicable hereafter. It may well be that here 'the criminal is to go free because the constable blundered.' Notwithstanding, when an officer's blunder deprives a defendant of his only opportunity to obtain evidence which might prove his innocence, the State will not be heard to say that such evidence did not exist.

Id. at 555, 178 S.E.2d at 467 (emphasis supplied).

In contrast to the facts in *Hill*, no evidence in the record suggests the State took affirmative steps to deprive Defendant of any access to potential witnesses or an attorney, such as by preventing them from talking to Defendant or entering the jail to observe her. *See id.*

Unlike the defendant in *Hill*, Defendant was told of her right to have observers present, was not limited to one phone call following her arrest, was allowed and did make numerous calls to multiple individuals and was released to a sober adult within less than three hours. Additionally, the Supreme Court later acknowledged in *Knoll* that the *per se* prejudice rule stated in *Hill* is no longer applicable. *Knoll*, 322 N.C. at 545, 369 S.E.2d at 564 ("Because of the change in North Carolina's driving while intoxicated laws, denial of access is no longer inherently prejudicial to a defendant's ability to gather evidence in support of his innocence in every driving while impaired case." (citation omitted)).

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Defendant's arguments fail to demonstrate "irreparable prejudice to the preparation of defendant's case." *See Labinski*, 188 N.C. App. at 124, 654 S.E.2d at 742-43. Defendant does not raise any "good and sufficient cause" to support this Court's exercise of our discretion to grant her petition and issue the extraordinary writ of certiorari. *See Grundler*, 251 N.C. at 189, 111 S.E.2d at 9; *Roux*, 263 N.C. at 153, 139 S.E.2d at 192; *Ross*, 369 N.C. at 400, 794 S.E.2d at 293.

Defendant pled guilty to DWI in a plea bargain in exchange for the State's dismissal of two charges for possession of controlled substances for oxymorphone and Xanax, found upon her without a prescription when she was arrested for DWI. A defendant can plead guilty and reserve the right to challenge a motion to suppress pursuant to N.C. Gen. Stat. §§ 15A-979(b) (2017) and 15A-1444(e) (2017). Here, Defendant has never argued any evidence the State gathered in her case was obtained in violation of her constitutional or statutory rights and should be suppressed. Defendant attempts to appeal from an order denying her motion to dismiss entered prior to her guilty plea. This issue is not listed as one of the grounds for appeal of right set forth in N.C. Gen. Stat. § 15A-1444. Defendant has no statutory right to plead guilty, while preserving a right to appeal the denial of her motion to dismiss. *See* N.C. Gen. Stat. § 15A-1444.

As this Court has previously stated,

We are reluctant to issue a writ of certiorari permitting direct review of issues that otherwise would not be reviewable on direct appeal because of a guilty plea. Permitting review by certiorari in these circumstances 'could damage the integrity of the plea bargaining process' by undermining the finality that the State secures when a defendant pleads guilty.

State v. Benton, __ N.C. App. __, 801 S.E.2d 396 (2017). Allowing certiorari under these facts could also jeopardize the adequate state procedure exemption to federal post-conviction relief. *See, e.g., Brown v. Lee*, 319 F.3d 162, 169 (4th Cir. 2003).

Defendant received the benefit of her plea bargain when the State agreed to dismiss the two charges for possession of controlled substances. Defendant pled guilty to DWI prior to the State Bureau of Investigation conducting a chemical analysis of her properly taken blood sample. Defendant stipulated "there's a factual basis for purposes of the DWI charge[,] pursuant to her guilty plea. Defendant has not demonstrated any "good and sufficient cause" to justify exercising our discretion to grant her petition and issue a writ of certiorari to allow her

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to challenge purported statutory violations surrounding a conviction to which she voluntarily pled guilty.

In addition to our analysis above, Defendant's petition also fails to assert any of the grounds for allowing her petition and issuing a writ of certiorari contained in Appellate Rule 21 for us to exercise our discretion to grant Defendant's petition under that Rule. *See Ledbetter*, __ N.C. at __, 814 S.E.2d at 43; N.C. R. App. P. 21(a)(1). Defendant failed to demonstrate any grounds for this Court to invoke Appellate Rule 2. *See id.*; *see also* N.C. R. App. P. 2.

III. Conclusion

Defendant has failed to demonstrate any "irreparable prejudice to the preparation of defendant's case," "good and sufficient cause" or any other grounds for purported statutory violations to support granting her petition for a writ of certiorari under the statute or our appellate rules. In the exercise of our discretion, Defendant's petition for writ of certiorari is denied. Defendant's purported appeal is dismissed. *It is so ordered.*

PETITION DENIED AND APPEAL DISMISSED.

Judge DIETZ concurs.

Judge ARROWOOD concurs in the result.

STATE OF NORTH CAROLINA
v.
JAMES LEE MURPHY

No. COA17-1287

Filed 21 August 2018

1. Damages and Remedies—restitution—not arising from convictions—statutory authority

Where the State dismissed several breaking and entering charges against defendant in return for defendant's guilty pleas and stipulation to restitution, the trial court lacked statutory authority to order defendant to pay restitution to the alleged victims of the offenses in the dismissed indictments, because restitution may be ordered only to remedy losses arising out of offenses for which a defendant is convicted.

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2. Damages and Remedies—restitution—invalidly ordered restitution—remedy

Where portions of an order of restitution were invalid (because the losses arose from dismissed charges), the proper remedy was to vacate the restitution order and remand for resentencing on restitution. Defendant's stipulation to restitution as part of his plea agreement was not an agreement to pay restitution—but merely an admission that there was a factual basis for restitution—so the invalidly ordered restitution was not an essential or fundamental term of the agreement.

Appeal by defendant from judgments entered 21 March 2017 by Judge Cy A. Grant in Pitt County Superior Court. Heard in the Court of Appeals 16 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kacy L. Hunt, for the State.

The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for defendant.

ELMORE, Judge.

Defendant James Lee Murphy appeals criminal judgments entered upon his guilty pleas to seven counts of felony breaking and entering into seven different residences on different dates, and a civil judgment ordering he pay \$23,113.00 in restitution to fourteen alleged victims identified in the State's restitution worksheet. In return for defendant's pleas and his stipulation to restitution as provided in the State's restitution worksheet, the State dismissed thirteen indictments against him, three of which contained the only charges linked to losses suffered by four of the fourteen alleged victims to whom the trial court ordered he pay restitution.

On appeal, defendant challenges the factual basis for two of his seven pleas and the validity of the trial court's restitution order. Despite defendant's failure to give notice of appeal at sentencing, N.C. R. App. P. 4(a), we allow his petition to issue a writ of *certiorari* solely to review the restitution order and address his arguments that (1) the trial court lacked authority to order restitution as to the four victims not affected by the seven breaking-and-entering counts to which he pled guilty; and (2) since the invalidly ordered restitution was part of the plea agreement,

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his entire plea agreement must be set aside and the case remanded for new proceedings.

Because a trial court is only statutorily authorized to order restitution for losses attributable to a defendant's perpetration of crimes for which he or she is convicted, we hold the trial court invalidly ordered defendant to pay restitution for pecuniary losses arising from his alleged perpetration of the charges in the three indictments the State dismissed pursuant to the plea agreement. Additionally, although defendant stipulated to this invalidly ordered restitution in the plea agreement, a stipulation to restitution is not an express agreement to pay restitution, and we therefore hold that defendant's entire plea agreement need not be set aside. Accordingly, we vacate the restitution order and remand for resentencing only on the issue of restitution.

I. Background

From 8 August 2016 to 27 February 2017, defendant was indicted for multiple breaking-and-entering and related larceny charges, including offenses defendant allegedly perpetrated at ten different residences on different dates. On 21 March 2017, defendant entered in a plea agreement in which he pled guilty to seven felony breaking-and-entering charges at seven of the ten residences and stipulated to restitution as provided in the State's restitution worksheet; in return, the State dismissed the remaining indictments, including the offenses defendant allegedly perpetrated at the other three residences. In the transcript of plea, the plea arrangement provides that "[defendant] will plea to 7 counts of breaking and/or entering in lieu of the charges listed on the back of this transcript[.]" and defendant checked the following box: "The defendant stipulates to restitution to the party(ies) in the amounts set out on 'Restitution Worksheet, Notice And Order (Initial Sentencing)' (AOC-CR-611)." The restitution worksheet listed fourteen alleged victims—ten of whom were linked to the seven residences defendant pled guilty to breaking into and entering; four of whom were linked to the three residences defendant was charged with breaking into and entering, but the State dismissed pursuant to the plea agreement.

On 22 March 2017, the trial court at the plea hearing described the entire plea agreement as follows: "And the plea bargain is that upon your plea of guilty to these seven charges the State will dismiss all other charges[.]" After accepting defendant's guilty pleas, the trial court during sentencing ordered that

[a]s a condition of work release and post-trial release, the Defendant is to make restitution to Shelton [sic] Dancy in

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the amount of \$1706.00; Sheldon Jordan in the amount of \$600.00; to Brice Wagoner, [sic] \$600.00; to Ciandra [sic] Carmack, \$1750.00; to Jeremy Williams and Tomika [sic] Brimmage [sic] . . . \$4125.00; to Jasmine Howard, \$997.00; Randy Robertson, \$1050.50; to Carmen [sic] Keeter, \$650.00; to Jose Martinez, \$1400.00; to Natalie Day, \$1735.00; to Shaquela [sic] Day, \$1000.00; to Jordan Hostetler, \$500.00.

That same day, the trial court entered a civil judgment ordering defendant to pay, *inter alia*, \$23,113.00 in restitution; and criminal judgments imposing seven consecutive sentences of eight to nineteen months in prison, recommending work release, and recommending payment of the civil judgment as a condition of defendant's probation and to be taken from his work-release earnings. Seven days later, on 29 March, defendant returned to the trial court requesting a reconsideration of his sentence. When the trial court denied his request, defendant gave oral notice of appeal.

II. Errors Raised

On appeal, defendant asserts the trial court erred by (1) accepting his guilty pleas because two of the seven felony breaking-and-entering counts were factually unsupported, and (2) ordering he pay restitution to alleged victims of the charges dismissed by the State pursuant to the plea agreement.

III. Appellate Jurisdiction

Defendant concedes his right to appellate review is contingent upon this Court granting his petition for *certiorari* review because, as a guilty pleading defendant, he has no statutory right to challenge the factual basis for his pleas, *see* N.C. Gen. Stat. § 15A-1444(e) (2017), and, further, he violated our Appellate Procedure Rule 4(a) by failing to give oral notice of appeal at sentencing, *see* N.C. R. App. P. 4(a) (requiring in part “oral notice of appeal at trial”). Accordingly, defendant has petitioned this Court to issue a writ of *certiorari* in order to enable us to conduct a merits review of the two main issues he raises on appeal. *See* N.C. Gen. Stat. § 15A-1444(e) (permitting a defendant to “petition the appellate division for review [of whether his or her guilty pleas were supported by a sufficient factual basis] by writ of certiorari”); N.C. R. App. P. 21(a)(1) (granting this Court authority to issue a writ of *certiorari* “in appropriate circumstances” to review lower court judgments and orders, including but not limited to “when the right to prosecute an appeal has been lost by failure to take timely action[.] . . .”).

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After carefully considering the arguments presented in defendant's principal and reply briefs, and in his petition, we conclude there is no merit to his challenges to the factual bases of his pleas and thus decline to exercise our discretion to issue a writ of *certiorari* to address the first issue he presents. However, because we conclude defendant's challenges to the restitution order have merit, we exercise our discretion to issue a writ of *certiorari* in order to review the restitution order and address the merits of the second issue he presents. *See, e.g., State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016) ("The decision concerning whether to issue a writ of certiorari is discretionary, and thus, the Court of Appeals may choose to grant such a writ to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause." (citing *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579, 140 S.E. 230, 231 (1927))).

IV. Analysis

Defendant argues (1) trial courts have no authority to order restitution to victims of unconvicted crimes and, therefore, the trial court here invalidly ordered he pay restitution to alleged victims of the charges the State dismissed pursuant to the plea agreement; and (2) because this invalidly awarded restitution was part of the plea agreement, the proper remedy on appeal is to vacate his entire plea agreement and remand for new proceedings.

The State does not address the trial court's statutory authority to award restitution to victims of unconvicted crimes; rather, it argues, (1) because defendant in his plea agreement stipulated to restitution to those victims, the State was relieved of its burden to present evidence to support restitution and thus the restitution ordered should be affirmed; and (2) even if restitution was invalidly awarded to alleged victims of charges the State dismissed, the proper remedy here is not to set aside the entire plea agreement but to vacate the restitution order and remand for resentencing solely on the issue of restitution.

We agree with defendant that the restitution ordered to the four victims for pecuniary losses linked only to defendant's conduct in allegedly perpetrating the crimes charged in the three dismissed indictments was invalid. However, we agree with the State that the proper remedy is not to set aside the entire plea agreement but to vacate the restitution order and remand for resentencing solely on restitution.

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A. Restitution

[1] N.C. Gen. Stat. § 15A-1340.34 governs “[r]estitution generally” and instructs that “[w]hen sentencing a defendant *convicted of a criminal offense*, the court shall determine whether the defendant shall be ordered to make restitution to any victim of the offense in question.” *Id.* § 15A-1340.34(a) (2017) (emphasis added). Our guilty plea statute, while not using the term “convicted,” provides that a “proposed plea arrangement may include a provision for the defendant to make restitution . . . to . . . aggrieved . . . parties for the . . . loss caused by the . . . *offenses committed* by the defendant.” N.C. Gen. Stat. § 15A-1021(c) (2017) (emphasis added). Similarly, our statute governing conditions of probation provides that, “[a]s a condition of probation, a defendant may be required to make restitution . . . to . . . aggrieved . . . parties . . . for the . . . loss caused by the defendant *arising out of the . . . offenses committed* by the defendant.” N.C. Gen. Stat. § 15A-1343(d) (2017) (emphasis added).

Thus, the restitution authorized under our General Statutes requires a direct nexus between a convicted offense and the loss being remedied. *Compare State v. Billinger*, 213 N.C. App. 249, 258, 714 S.E.2d 201, 208 (2011) (“As we have vacated defendant’s conspiracy conviction . . . , there is no conspiracy conviction to which the restitution order may be attached. Consequently, we must also vacate the restitution award”); *with State v. Dula*, 67 N.C. App. 748, 751, 313 S.E.2d 899, 901 (1984) (upholding restitution ordered for stolen goods to a victim of an alleged breaking-and-entering and related larceny, despite a jury acquittal on the larceny charge, since the jury convicted the defendant of the related breaking-and-entering charge, and restitution was ordered as a condition of probation), *aff’d per curiam*, 312 N.C. 80, 80, 320 S.E.2d 405, 406 (1984) (“The Court of Appeals correctly held that the trial court did not commit error when it required the defendant to make restitution for the loss and damage caused by the defendant ‘arising out of’ the offense committed by her as provided by G.S. 15A-1343(d).”). Put another way, restitution is securely tied to the losses attributable to the offenses of conviction. *See, e.g., State v. Valladares*, 182 N.C. App. 525, 526, 642 S.E.2d 489, 491 (2007) (“It is well settled that ‘for an order of restitution to be valid, it must be related to the criminal act for which defendant was convicted, else the provision may run afoul of the constitutional provision prohibiting imprisonment for debt.’ ” (quoting *State v. Froneberger*, 81 N.C. App. 398, 404, 344 S.E.2d 344, 348 (1986))).

Here, the trial court entered a civil judgment requiring defendant to pay \$23,113.00 in restitution in relevant part as follows: (1) \$1,050.50 to Randy Robertson for 15 CRS 54923, which included one felony

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breaking-and-entering count and one larceny-after-breaking-and-entering count, arising from offenses defendant allegedly perpetrated on 26 May 2015 at 341 Ormond Street in Ayden; (2) \$650.00 to Camryn Keeter for 16 CRS 52073, which included one breaking-and-entering-with-the-intent-to-commit-a-larceny count, arising from an offense defendant allegedly perpetrated on 15 March 2016 at 110 South Harding Street in Greenville; (3) \$1,400.00 to Jose Martinez for 16 CRS 52074, which included one breaking-and-entering-with-the-intent-to-commit-a-larceny count, arising from an offense defendant allegedly perpetrated on 18 February 2016 at 1088 Cheyenne Court in Greenville; and (4) \$500.00 to Jordan Hostetler for an unidentified offense. Pursuant to the plea agreement, defendant pled guilty to seven counts of felony breaking and entering into seven other residences on different dates, and the State dropped, *inter alia*, the indictments in 15 CRS 54923, 16 CRS 52073, and 16 CRS 52074. These indictments contained the only charges against defendant for conduct attributable to the alleged losses suffered by Robertson, Keeter, Martinez, and Hostetler.¹

As defendant was not convicted of any breaking-and-entering or related offenses as to the three residences of these four alleged victims, and as the alleged pecuniary losses suffered by these four alleged victims were unrelated to defendant's conduct in perpetrating the seven other break-ins to which he pled guilty, we hold the trial court lacked statutory authority to order restitution as to Robertson, Keeter, Martinez, and Hostetler. *See Billinger*, 213 N.C. App. at 258, 714 S.E.2d at 208.

We recognize that our Supreme Court in *Dula* affirmed in a *per curiam* opinion our holding that a trial court validly ordered restitution as a condition of the defendant's probation to a victim for the pecuniary loss of personal property allegedly stolen from her residence, although the jury acquitted the defendant of the larceny charge. *See Dula*, 312 N.C. at 80, 320 S.E.2d at 406 ("The Court of Appeals correctly held that the trial court did not commit error when it required the defendant to make restitution for the loss and damage caused by the defendant 'arising out of' the offense committed by her . . ."). However, the jury in

1. While the first three alleged victims were identified in the indictments, both parties on appeal concede the State's restitution worksheet contains the only record reference to Hostetler. We note that worksheet indicates Hostetler shared the same physical address as Keeter, 110 South Harding Street, indicating Hostetler could only be an alleged victim of the same breaking-and-entering offense in 16 CRS 52073. We also note the arrest warrant alleges defendant stole \$1,200.00 of personal property from Keeter, which appears to support the later restitution award of \$650.00 to Keeter and \$500.00 to Hostetler.

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Dula convicted the defendant of a related breaking-and-entering-with-the-intent-to-commit-a-larceny charge she allegedly perpetrated at the same residence and on the same date. *Dula*, 67 N.C. App. at 751, 313 S.E.2d at 901. Thus, the restitution ordered as a condition of the defendant's probation in *Dula* was not solely supported by the acquitted larceny charge but "ar[ose] out of" the breaking-and-entering conviction.

Here, contrarily, the charges in the three dismissed indictments were wholly unrelated to defendant's conduct in perpetrating the seven breaking-and-entering charges to which he pled guilty, offenses that occurred at seven different residences on seven different dates. Therefore, unlike the restitution ordered as to the victims of the breaking-and-entering charges to which defendant pled guilty, the restitution ordered as to the alleged victims of the charges that were dismissed did not "aris[e] out of" any offense for which defendant was convicted.

As to the State's argument that the restitution ordered should nonetheless be upheld based on defendant's stipulation in the plea arrangement to restitution as to these four alleged victims, we conclude that parties to a plea agreement cannot by stipulation increase the statutory powers of a sentencing judge to authorize restitution beyond that allowed under our General Statutes.

Accordingly, because the trial court lacked statutory authority to order defendant pay restitution to alleged victims of unconvicted offenses for losses not attributable to his conduct in perpetrating the offenses to which he pled guilty, its order of restitution as to Robertson, Keeter, Martinez, and Hostetler was invalid. Having reached this conclusion, we next turn to the appropriate appellate remedy.

B. Plea Agreement

[2] Defendant asserts that because he agreed to pay this invalid restitution as part of the plea deal, the appropriate remedy is to set aside his entire plea agreement and remand the case for new proceedings. The State replies that the appropriate remedy, as ordinarily applied when restitution is invalidly ordered, is to vacate the restitution order and remand the case solely for resentencing on restitution. *See, e.g., State v. Hunt*, ___ N.C. App. ___, ___, 792 S.E.2d 552, 563 (2016). We agree with the State.

To support his request to set aside the entire plea agreement, defendant relies on *State v. Rico*, 218 N.C. App. 109, 720 S.E.2d 801 (Steelman, J., dissenting), *rev'd for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012) (*per curiam*). In *Rico*, the defendant was charged

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with murder and entered into a plea agreement in which he pled guilty to voluntary manslaughter. *Id.* at 110, 720 S.E.2d at 802. As part of the plea agreement, the defendant admitted to the existence of an aggravating factor and agreed to a sentence in the aggravating range, *id.* at 111, 720 S.E.2d at 802, which both the majority panel and dissenting judge agreed the sentencing judge was statutorily unauthorized to impose, *id.* at 118–19, 720 S.E.2d at 807.

As to the appropriate remedy, the majority panel reasoned that because the defendant “fully complied with the terms of his plea agreement, and the risk of any mistake in a plea agreement must be borne by the State[.]” “the State remains bound by the plea agreement[.]” *Id.* at 119, 720 S.E.2d at 807. Therefore, the majority decreed, the “defendant should be resentenced upon his guilty plea to voluntary manslaughter.” *Id.* The dissenting judge reasoned that “essential and fundamental terms of the plea agreement were unfulfillable[.]” and the defendant “cannot repudiate in part without repudiating the whole[.]” *Id.* at 122, 720 S.E.2d at 809. Thus, the dissenting judge opined that “[t]he entire plea agreement must be set aside, and this case remanded . . . for disposition on the original charge of murder.” *Id.* On appeal, our Supreme Court in a *per curiam* opinion reversed the majority’s decision as to the appropriate remedy and adopted the dissenting judge’s disposition of setting aside the entire plea agreement. *Rico*, 366 N.C. at 327, 734 S.E.2d at 571. *Rico* is distinguishable because the payment of restitution was not an “essential or fundamental term[]” of defendant’s plea agreement.

Here, in the transcript of plea, the arrangement provided that “[defendant] will plea to 7 counts of breaking and/or entering in lieu of the charges listed on the back of this transcript[.]” and defendant checked the following box in that same section: “The defendant stipulates to restitution to the party(ies) in the amounts set out on ‘Restitution Worksheet, Notice And Order (Initial Sentencing)’ (AOC-CR-611).”

At the plea hearing, the following relevant colloquy occurred:

THE COURT: Now, you are pleading guilty to seven charges of breaking and/or entering; correct?

THE DEFENDANT: Yes, sir.

. . . .

THE COURT: And you agree that the plea of guilty is part of a plea bargain; correct?

THE DEFENDANT: Yes, sir.

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THE COURT: *And the plea bargain is that upon your plea of guilty to these seven charges the State will dismiss all other charges -*

THE DEFENDANT: Yes, sir.

THE COURT: *- in Superior and District Court?*

THE DEFENDANT: Yes, sir.

THE COURT: Do you now accept this arrangement?

THE DEFENDANT: Yes, sir.

(Emphasis added.) Following its acceptance of defendant's guilty pleas, the trial court recommended work release and ordered "as a condition of work release and post-trial release" that defendant pay the particular orders of restitution.

As reflected, despite defendant's stipulation to restitution as provided in the State's restitution worksheet, defendant never agreed to pay restitution as part of the plea agreement. Rather, as described in the transcript of plea and explained during the plea colloquy, the essential and fundamental terms of the plea agreement were that defendant would plead to seven counts of felony breaking-and-entering, and the State would drop the remaining charges. A stipulation to restitution as part of a plea agreement merely relieves the State of its burden to present a supportive factual basis, *cf. State v. Blount*, 209 N.C. App. 340, 348, 703 S.E.2d 921, 927 (2011) ("A restitution worksheet, unsupported by testimony, documentation, or *stipulation*, 'is insufficient to support an order of restitution.' " (emphasis added) (quoting *State v. Mauzer*, 202 N.C. App. 546, 552, 688 S.E.2d 774, 778 (2010))); it is not an express agreement to pay that particular restitution as a condition of the plea agreement. As defendant never agreed to pay restitution as part of the plea agreement, the invalidly ordered restitution was not an "essential or fundamental" term of the deal. Accordingly, we hold the proper remedy here is not to set aside defendant's entire plea agreement but to vacate the restitution order and remand for resentencing solely on the issue of restitution.

V. Conclusion

The trial court's restitution order in this case was unauthorized. Defendant pled guilty only to breaking and entering the seven residences of Sheldon Jordan, Shakeela and Natalie Day, Sheldon Dancy and Natasha Williams, Jeremy Williams and Tonica Brimage, Ceondra Carmack, Jasmine Howard, and Brice Wagner. Because the restitution order encompassed losses stemming from breaking-and-entering and

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related larceny offenses defendant allegedly perpetrated at three different homes on different dates, the trial court lacked statutory authority to order defendant pay restitution to the four residents of those three homes—Randy Robertson, Jose Martinez, Camryn Keeter, and Jordan Hostetler. Additionally, although defendant stipulated in the plea agreement to restitution to these four alleged victims, he never expressly agreed to pay restitution as part of that agreement. As the invalidly ordered restitution was not an essential or fundamental term of the plea agreement, the entire plea agreement need not be set aside. Accordingly, we vacate the trial court's restitution order and remand for resentencing solely on the issue of restitution.

VACATED AND REMANDED.

Judges HUNTER, JR. and ZACHARY concur.

TOWN OF LITTLETON, PLAINTIFF

v.

LAYNE HEAVY CIVIL, INC. F/D/B/A REYNOLDS, INC.; LAYNE INLINER, LLC, F/D/B/A
REYNOLDS INLINER, LLC; AND MACK GAY ASSOCIATES, P.A., DEFENDANTS

No. COA17-1137

Filed 21 August 2018

Statutes of Limitation and Repose—sewer rehabilitation project—nullum tempus doctrine—proprietary versus governmental function

In a dispute between a town and contractors over a sewer rehabilitation project, the trial court did not err in granting summary judgment in favor of defendant contractors on the basis that all of the claims, including negligence, breach of contract, and unfair and deceptive trade practices, were barred by the relevant statutes of limitations since the town waited over four years to bring suit. Since the operation and maintenance of a sewer system is a proprietary function, and not a governmental one, the doctrine of nullum tempus did not operate to exempt the municipality from the running of time limitations.

Appeal by plaintiff from orders entered 20 June and 5 July 2017 by Judge Beecher R. Gray in Halifax County Superior Court. Heard in the Court of Appeals 7 March 2018.

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Hedrick Gardner Kincheloe & Garofalo LLP, by Joshua D. Neighbors and Patricia P. Shields, and Tharrington Smith, LLP, by Rod Malone and Kristopher B. Gardner, for plaintiff-appellant.

Ellis & Winters LLP, by Stephen D. Feldman, Leslie C. Packer, Steven A. Scoggan, and Alexander M. Pearce, for defendants-appellees Layne Heavy Civil, Inc. and Layne Inliner, LLC.

Young Moore and Henderson, P.A., by Walter E. Brock, Jr. and Andrew P. Flynt, for defendant-appellee Mack Gay Associates, P.A.

BERGER, Judge.

The Town of Littleton (“Plaintiff”) appeals two orders granting summary judgment in favor of Layne Heavy Civil, Inc. and Layne Inliner, LLC (“Defendant Layne”) and Mack Gay Associates, P.A. (“Defendant Mack Gay”) in a dispute over a sewer rehabilitation project. The trial court ruled in favor of all Defendants because the applicable statutes of limitation barred each of Plaintiff’s claims. Plaintiff argues that the trial court erred because the sewer project was a governmental function to which statutes of limitation would not apply under the doctrine of *nullum tempus*. However, a municipality’s operation and maintenance of a sewer system is a proprietary function, not governmental, and thus, the doctrine of *nullum tempus* is inapplicable. We therefore affirm the orders of the trial court.

Factual and Procedural Background

In 2004, Plaintiff received grant money from the North Carolina Clean Water Management Trust Fund (“the Fund”) to rehabilitate its sewer system. One purpose of the Fund is to “help finance projects that enhance or restore degraded surface waters; protect and conserve surface waters, including drinking supplies, and contribute toward a network of riparian buffers and greenways for environmental, educational, and recreational benefits.” N.C. Gen. Stat. § 143B-135.230 (2017). Plaintiff contracted with Defendant Mack Gay to provide assistance in applying for grant funding, design the rehabilitation project, and perform construction administration and observation services.

The main scope of the project was to eliminate storm water infiltration into Plaintiff’s sanitary sewer collection system, which would reduce costs and prevent untreated wastewater spills. Defendant Mack Gay provided construction plans in July 2005. The scope of proposed

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work included: rehabilitation or replacement of existing sewer lines, manholes, and an existing pump station; construction of new pump stations; installation of a generator at a wastewater treatment plant; and other miscellaneous repairs.

Plaintiff contracted with Defendant Layne for the rehabilitation and repair work that began in December 2005 and was completed by October 2008. Beginning in April 2010, residents informed Plaintiff of serious deficiencies with the sewer rehabilitation. Inspections in October 2010 and March 2011 confirmed significant issues with the project. Recognizing the seriousness of the deficiencies, on November 7, 2011, Plaintiff's town commissioners and town attorney discussed holding Defendants accountable for these deficiencies. The town attorney was authorized to take actions to ensure the issues were corrected. Plaintiff's town commissioners formally authorized the town attorney to file suit on January 3, 2013.

However, three years passed before Plaintiff filed this lawsuit against Defendants on January 8, 2016. Plaintiff's unverified complaint alleged negligence, fraud, negligent misrepresentation, breach of contract, breach of warranty, professional malpractice, trespass to chattels, conversion, and unfair and deceptive trade practices. Defendants moved to dismiss all claims pursuant to Rule 12 of the North Carolina Rules of Civil Procedure, and the trial court dismissed the trespass and conversion claims, as well as the claim of unfair and deceptive trade practices against Defendant Mack Gay.

On May 8 and May 11, 2016, Defendants filed motions for summary judgment on all remaining claims by Plaintiff, alleging that all were barred by the applicable statutes of limitation. Plaintiff filed neither responsive pleadings nor additional evidence. Since there were no disputes as to the material facts, the trial court granted summary judgment in favor of Defendant Layne in an order entered June 20, 2017 and Defendant Mack Gay in an order entered July 5, 2017. Both of the trial court's orders granted summary judgment against Plaintiff because of the expiration of the applicable statutes of limitation. Plaintiff timely appealed these orders.

Standard of Review

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C.

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569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

Analysis

Plaintiff argues that the trial court erred in granting summary judgment in favor of Defendants due to the expiration of statutes of limitation. Plaintiff asserts that its claims are not barred by the statutes of limitation because the project was a governmental function and was therefore protected by the doctrine of *nullum tempus*. We disagree.

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). Further,

[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C. Gen. Stat. § 1A-1, Rule 56(e); accord *Asheville Sports Props., LLC v. City of Asheville*, 199 N.C. App. 341, 344, 683 S.E.2d 217, 219 (2009).

Causes of action based on negligence, fraud, negligent misrepresentation, breach of contract, breach of warranty, and professional malpractice are each subject to a three-year statute of limitation. N.C. Gen. Stat. §§ 1-15(c), -52 (2017). A cause of action based on unfair and deceptive trade practices is subject to a four-year statute of limitation. N.C. Gen. Stat. § 75-16.2 (2017). Plaintiff filed its suit more than four years after all claims arose. Its suit would therefore be barred unless the doctrine of *nullum tempus* applies.

Our Supreme Court has described the doctrine of *nullum tempus occurrit regi* by stating that:

nullum tempus survives in North Carolina and applies to exempt the State and its political subdivisions from the running of time limitations unless the pertinent statute expressly includes the State. . . . *Nullum tempus* does not, however, apply in every case in which the State is a party. If the function at issue is governmental, time limitations

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do not run against the State or its subdivisions unless the statute at issue expressly *includes* the State. If the function is proprietary, time limitations do run against the State and its subdivisions unless the statute at issue expressly *excludes* the State.

Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co., 332 N.C. 1, 8-9, 418 S.E.2d 648, 653-54 (1992).

As in sovereign immunity cases, whether the subject matter of the suit is governmental or proprietary will determine whether the courts must apply *nullum tempus* or the appropriate statutes of limitation. See *id.* Generally, “[i]f the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and ‘private’ when any corporation, individual, or group of individuals could do the same thing.” *Britt v. City of Wilmington*, 236 N.C. 446, 451, 73 S.E.2d 289, 293 (1952). “The law is clear in holding that the operation and maintenance of a sewer system is a proprietary function where the municipality sets rates and charges fees for the maintenance of sewer lines.” *Harrison v. City of Sanford*, 177 N.C. App. 116, 121, 627 S.E.2d 672, 676, *disc. review denied*, ___ N.C. ___, 639 S.E.2d 649 (2006); see also *Union Cty. v. Town of Marshville*, ___ N.C. App. ___, ___, 804 S.E.2d 801, 805 (2017) (municipality not entitled to immunity because operation and maintenance of sewer system is proprietary in nature), *disc. review denied* ___ N.C. ___, 814 S.E.2d 101 (2018); *Bostic Packaging, Inc. v. City of Monroe*, 149 N.C. App. 825, 829, 562 S.E.2d 75, 79, *disc. review denied*, 355 N.C. 747, 565 S.E.2d 192 (2002) (municipality not immune from tort liability in the operation and maintenance of a sewer system).

Plaintiff contends that the facts of this case compel us to follow *McCombs v. City of Asheboro*, 6 N.C. App. 234, 170 S.E.2d 169 (1969). Plaintiff interprets *McCombs* as holding that the construction of a sewer system is a governmental function, thus entitling the City of Asheboro to governmental immunity, and, by analogy, entitles Plaintiff to the protection of *nullum tempus*. However, Plaintiff’s reliance on *McCombs* is misguided for two reasons. First, *McCombs* refrained from deciding whether the City of Asheboro’s construction of a new sewer line was a governmental or proprietary function. See *id.* at 242, 170 S.E.2d at 175 (“Conceding, *arguendo*, that [Plaintiff’s allegation that the Defendant was engaged in a proprietary function in the construction of a sewer line] is sufficient to save the complaint from demurrer on the ground of governmental immunity, we are of the opinion that the complaint must fail [because there are no facts alleged constituting negligence of the

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defendant].”). Second, *McCombs* is distinguishable from the case *sub judice* because the defendant in *McCombs* was constructing new sewer lines, *id.* at 237, 170 S.E.2d at 172, whereas here, Plaintiff was maintaining sewer system assets in need of repair.

The final report expressly acknowledged the purpose of the project was to rehabilitate more than 35,000 linear feet of sewer collection lines and nearly 120 manhole covers; replace or build multiple pump stations; and conduct “[m]iscellaneous repairs to short line segments.” Defendant Mack Gay’s final report on the project states that the main purpose of the project was to reduce inflow and infiltration of storm water into the sewer system. The evidence Defendants submitted in support of its summary judgment motions established that one of the purposes of the project was to reduce costs of running the sewer system. This evidence tended to show that the project would eliminate expenses incurred per gallon of inflow and infiltration, which were estimated to cost \$0.09 per gallon per year. Additionally, the project would also eliminate Plaintiff’s potential liability for sewage spills resulting from rainwater penetrating the system, which, under state law, could have cost up to \$25,000.00 per day.

The record before us shows that there is no genuine issue as to any material fact and Defendants were entitled to a judgment as a matter of law. The evidence describes a maintenance project on a city-operated sewer system to reduce the infiltration and inflow of storm water. This maintenance would reduce costs to Plaintiff in its running of the sewer system and would reduce any waste water spills. Because the operation and maintenance of a sewer system is a proprietary function, Plaintiff’s maintenance project was a proprietary function. The doctrine of *nullum tempus* does not apply to Plaintiff’s claims. Therefore, the trial court did not err in granting summary judgment in favor of Defendants.

Conclusion

Defendants properly pleaded the applicable statutes of limitation as a defense against each of Plaintiff’s claims. The undisputed facts describe a sewer system maintenance project, which is a proprietary function. Thus, *nullum tempus* does not apply to Plaintiff’s claims, and the statutes of limitation control. The trial court did not err in granting summary judgment to Defendants because of the expiration of the applicable statutes of limitation. The orders of the trial court are affirmed.

AFFIRMED.

Judges ELMORE and INMAN concur.

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DWIGHT WATSON, PLAINTIFF

v.

GURTHA WATSON, DEFENDANT

No. COA17-899

Filed 21 August 2018

1. Divorce—equitable distribution—classification—marital versus separate property—house

In a equitable distribution action, the trial court erred in distributing the parties' home to the wife after finding that the home was separate property. Since only marital property may be distributed in equitable distribution, the trial court was instructed on remand to classify and value the home and any marital or separate interests in the home and then distribute any marital interest.

2. Divorce—equitable distribution—valuation—car

In an equitable distribution action, the trial court erred in valuing a Cadillac El Dorado at \$10,000 as of the date of separation where there was no evidence to support that valuation as the fair market value on the date of separation, and where the only evidence appeared to be that the car's value was \$1,880 on the relevant date.

3. Divorce—equitable distribution—valuation—home equity—401(k)

In an equitable distribution action, the trial court's determination that an unequal distribution was equitable was not based on a proper classification and valuation of assets, including a home equity line of credit (HELOC) taken out by the husband and the husband's 401(k). The trial court classified the HELOC as a separate debt but then stated there was no evidence of its value despite not needing to distribute it; conversely, the trial court classified the 401(k) as marital debt but did not value it, as it would need to do before distribution. Finally, where the trial court erroneously found the parties separated in 2007, and not 2009, its determination that there was no evidence of the value of the 401(k) at the date of separation despite a letter from the plan administrator dated 2009 with the account's value may or may have been prejudicial, depending on whether the court chose not to rely on the letter for a reason other than the misapprehension about the correct date of separation. There is no way to know if an unequal distribution of the marital estate is equitable if there is no finding on the net value of the entire marital estate.

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4. Divorce—equitable distribution—marital property—unequal distribution—liquid assets

In an equitable distribution action that was remanded for errors in classification and valuation of the parties' property, the trial court also abused its discretion in ordering an unequal distribution of marital property using the distributional factors in N.C.G.S. § 50-20(c) without a proper valuation of marital assets and upon a misunderstanding of the difference between liquid and nonliquid assets.

Appeal by plaintiff from order entered 28 February 2017 by Judge Michael J. Denning in District Court, Wake County. Heard in the Court of Appeals 25 January 2018.

Stephanie J. Brown for plaintiff-appellant.

Law Office of Tiffanie C. Meyers, by Tiffanie C. Meyers, for defendant-appellee.

STROUD, Judge.

Plaintiff Dwight Watson ("Husband") appeals from the trial court's equitable distribution order entered 28 February 2017. On appeal, plaintiff contends that the trial court erred in its classification, valuation, and distribution of the parties' property and in granting defendant Gertha¹ Watson ("Wife") an unequal distribution of marital property. Because the trial court's findings of fact do not support its conclusions of law and because the distributional factors found by the trial court are based upon some of those erroneous findings and conclusions, we reverse the equitable distribution order and remand for entry of a new equitable distribution order.

Background

Husband and Wife were married in November 1989. Although the trial court's equitable distribution order found the date of separation as October 2007, the parties stipulated in the final pretrial order to a date of separation of October 2009.² Husband filed a claim for divorce and equitable distribution on 2 April 2015. On 1 June 2015, Wife filed her

1. The trial court's order from which this appeal lies erroneously spells defendant-Wife's first name as "Gurtha."

2. Husband had initially believed the date of separation to be in 2007, but by the time the pretrial order was entered, the parties had agreed the correct year was 2009.

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answer and counterclaims for post separation support, alimony, unequal distribution of marital property, and attorney's fees.

A hearing was held on 25 October 2016. Following the hearing, the trial court entered an equitable distribution order on 28 February 2017, which granted an unequal distribution in Wife's favor.³ Husband timely appealed to this Court.

Analysis

Husband argues that the trial court erred in valuing and distributing a portion of the parties' marital property and in granting Wife an unequal distribution of the marital property. The parties had only a few assets and one debt in contention.⁴ They had a home acquired a year before the marriage as joint tenants; the trial court found the marital home is "separate property held by a joint tenancy between the parties" but distributed the house to Wife and ordered Husband to execute any documents necessary to remove his name from the title and to pay the Home Equity Line of Credit ("HELOC"), which was secured by the marital home during the marriage, in a timely manner. The trial court also found that "[t]here is considerable equity in the marital residence which is marital property." The trial court found the HELOC debt is Husband's separate debt but found that it was "without any sufficient/or and competent evidence" of the remaining balance as of the date of separation to determine the payoff, although it made findings of the balance owed as of May 2015 of \$42,689.58. Husband also had a 401K plan with his employer which the trial court classified as marital property but again, the trial court found "[t]here is no sufficient and competent evidence to value [Husband's] 401K" as of the date of separation. The other item in contention is a Cadillac El Dorado, which is marital property.

Husband challenges some findings of fact as unsupported by the evidence and some conclusions of law as unsupported by the facts. He also argues that the trial court abused its discretion in ordering an unequal distribution based upon its erroneous findings of fact.

Our review of an equitable distribution order is limited to
determining whether the trial court abused its discretion

3. The trial court denied Wife's claim for post-separation support and she has not cross-appealed the order, so the trial court's disposition of the post-separation support claim is not a subject of this appeal.

4. There were other items of personal property, including three other cars, and accounts listed in the pretrial order and addressed by the order, but Husband did not raise any argument on appeal about the trial court's treatment of those items.

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in distributing the parties' marital property. Accordingly, the findings of fact are conclusive if they are supported by any competent evidence from the record.

However, even applying this generous standard of review, there are still requirements with which trial courts must comply. Under N.C.G.S. § 50–20(c), equitable distribution is a three-step process; the trial court must (1) determine what is marital and divisible property; (2) find the net value of the property; and (3) make an equitable distribution of that property.

....

In fact, to enter a proper equitable distribution judgment, the trial court must specifically and particularly classify and value all assets and debts maintained by the parties at the date of separation. In determining the value of the property, the trial court must consider the property's market value, if any, less the amount of any encumbrance serving to offset or reduce the market value. Furthermore, in doing all these things the court must be specific and detailed enough to enable a reviewing court to determine what was done and its correctness.

Robinson v. Robinson, 210 N.C. App. 319, 322-23, 707 S.E.2d 785, 789 (2011) (citations, quotation marks, and brackets omitted).

As to the actual distribution ordered by the trial court, when reviewing an equitable distribution order the standard of review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason.

Stovall v. Stovall, 205 N.C. App. 405, 407-08, 698 S.E.2d 680, 683 (2010) (citations, quotation marks, and brackets omitted).

I. Classification issues

Although Husband does not clearly identify an issue of classification of property, his arguments are largely based upon the trial court's findings and conclusions regarding classification. Neither the order nor Husband's brief separates the issues of classification, valuation, and distribution, but to review the issues, we must separate them. "[E]quitable distribution is a three-step process; the trial court must (1) determine

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what is marital and divisible property; (2) find the net value of the property; and (3) make an equitable distribution of that property.” *Robinson*, 210 N.C. App. at 323, 707 S.E.2d at 789 (citation, quotation marks, and brackets omitted).

[1] Husband argues the trial court erred by distributing the home to Wife and ordering him to remove his name from the deed and pay the HELOC, and his argument is primarily based upon the unequal distribution factors found by the trial court. But first, we must consider the classification of the home.

The order is internally contradictory on the classification of the home. The trial court found that the home is “separate property held by a joint tenancy between the parties.” Separate property cannot be distributed in equitable distribution. See *Langston v. Richardson*, 206 N.C. App. 216, 220, 696 S.E.2d 867, 871 (2010) (“Under N.C. Gen. Stat. Sec. 50-20(c), only marital property is subject to distribution. The trial court must classify and identify property as marital or separate depending upon the proof presented to the trial court of the nature of the assets.” (Citations and quotation marks omitted)). But then the trial court also found that “there is considerable equity in the marital residence which is marital property.” But if there is marital equity in the home, the trial court must value the marital interest before distributing it. See *Turner v. Turner*, 64 N.C. App. 342, 345, 307 S.E.2d 407, 408-09 (1983) (“Under G.S. 50-20(c), equitable distribution applies only to the net value of marital property. This requires the trial court to first ascertain *what is marital property*, then to find the net value of that property, and finally to make a distribution based upon the equitable goals of the statute and the various factors specified therein.”). And if the home itself is separate property, as the trial court found, it is not subject to distribution, yet the trial court distributed it to Wife, making essentially the same error as the court in *Turner*:

If the house was purchased by plaintiff before the marriage, as the finding states, then it was error to subject the house, as such, to equitable distribution, since under G.S. 50-20(a)(2), property acquired by a spouse before marriage is “separate,” rather than “marital,” property. If, however, an equity in this property developed during the marriage because of improvements or payments contributed to by defendant, that equity (as distinguished from a mere increase in value of separate property, excluded by the statute) could be marital property, in our opinion, upon appropriate, supportable findings being made. And if

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not marital property, such equity, if it developed, would be a factor requiring consideration by the court, along with the other factors specified in the statute, before determining how much of the marital property each party is entitled to receive. . . . But the findings made do not support the division ordered.

Turner, 64 N.C. App. at 346, 307 S.E.2d at 409.

The trial court therefore erred by distributing the home, and on remand, the trial court should follow the process set forth in *Turner* to classify and value the home and any marital or separate interests in the home and to distribute any marital interest.

II. Valuation issues

A. Cadillac El Dorado

[2] Husband contends that the trial court's finding of fact valuing the 1995 Cadillac El Dorado at \$10,000.00 is not supported by the evidence. We agree there is no evidence to support a finding of the value of the car as \$10,000.00 as of the date of separation. The final pretrial order included schedules "setting out the parties' contentions as to the nature and values of the marital property." Wife valued the 1995 Cadillac at \$1,880.00; Husband also valued the Cadillac at \$1,880.00. Husband argues the parties "stipulated" to the value so the court was bound by the stipulation. Wife counters that the parties did not *sign* the pretrial order and did not stipulate to values, although they both listed the same value. We agree that the pretrial order does not include a formal "stipulation" of value, but both parties alleged the same value. And the Pretrial Order did not purport to be a consent order which should be signed by the parties; it was entered based upon the pretrial conference held on 24 November 2015, and Wife claims no impropriety in the trial court's entry of the pretrial order.

The only evidence of the sum of \$10,000.00 was Husband's testimony he had paid off a \$10,000.00 balance of the loan on the vehicle with a portion of the proceeds from the HELOC, which he received in 2005, four years prior to the date of separation. But a loan payoff on a vehicle years prior to separation is not evidence of the fair market value of the vehicle on the date of separation. *See generally Walter v. Walter*, 149 N.C. App. 723, 733, 561 S.e.2d 571, 577 (2002) ("In an equitable distribution proceeding, the trial court is to determine the net fair market value of the property based on the evidence offered by the parties."). On remand, the court should value the car based upon the evidence of fair

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market value *as of the date of separation*, and it appears that \$1,880.00 is the only evidence of value as of the date of separation. *See generally Warren v. Warren*, 175 N.C. App. 509, 515, 623 S.E.2d 800, 804 (2006) (“In equitable distribution proceedings, marital property must be valued as of the date of the separation of the parties.” (Citation and quotation marks omitted)).

B. Valuation of home equity, HELOC, and 401K plan

[3] Husband addresses this issue as part of his argument regarding unequal distribution factors, but as noted above, the issue originates in the classification and valuation, or lack thereof, of these items and the order’s distribution of these assets. Equitable distribution is a three-step process: classification, valuation, and distribution. *See generally Robinson*, 210 N.C. App. at 323, 707 S.E.2d at 789. These three steps must be taken in order, so if the evidence is not sufficient to classify or value an item of property or debt, it cannot be distributed. *See, e.g., Estate of Nelson v. Nelson*, 179 N.C. App. 166, 168-69, 633 S.E.2d 124, 127 (2006) (“Failure to follow these steps carefully and in sequence may render the findings and conclusions inadequate, erroneous, or both.”), *aff’d per curiam*, 361 N.C. 346, 643 S.E.2d 587 (2007).

Husband took out a HELOC secured by the marital home during the marriage, but the trial court found that the HELOC is Husband’s *separate* debt based upon its findings regarding Husband’s sole control over the HELOC and his use of the funds. The trial court was unable to value the outstanding debt as of the date of separation because there was not sufficient evidence of this value. But since the HELOC was classified as a *separate* debt, it need not be valued and cannot be distributed. *See, e.g., Smith v. Smith*, 111 N.C. App. 460, 509-10, 433 S.E.2d 196, 226 (1993) (citations omitted) (“In determining an equitable distribution, the trial court must consider the debts of the parties. If the debt is a separate debt of one of the parties, then the court must consider it pursuant to N.C. Gen. Stat. § 50-20(c)(1). If the debt is a marital debt, that is, a debt incurred during the marriage for the joint benefit of the parties, then it must be valued and distributed.” (Citations and quotation marks omitted)), *rev’d in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994). Classification of property and debt comes first, and only marital property or debt is subject to the next two steps of valuation and distribution. *See, e.g., Wall v. Wall*, 140 N.C. App. 303, 307-08, 536 S.E.2d 647, 650 (2000) (“We continue to stress the importance of following the steps of first classifying, then valuing and distributing marital property. Each step is a prerequisite to the performance of the next, and failure to follow the prescribed order will result in a fatally flawed trial court

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disposition. Only those assets and debts that are *classified* as marital property and *valued* are subject to *distribution* under the Equitable Distribution Act[.]” (Citation and quotation marks omitted)).

In this case, the trial court found there was not “sufficient and competent evidence to value [Husband’s] 401K” as of the date of separation. Husband agrees with this finding, since it would be to his benefit, except that the trial court also used the 401K as a factor justifying the unequal distribution. Wife agrees the trial court did not have sufficient evidence to value the 401K, but she argues that it need not be valued to be a distributional factor. She is correct that the trial court need not value items used as distributional factors. *See Gum v. Gum*, 107 N.C. App. 734, 739, 421 S.E.2d 788, 791 (1992) (“The trial court is required to consider evidence of such contributions as a distributional factor according to N.C.G.S. § 50–20(c)(8). There is no language within § [50-20(c)] which would indicate that the trial court is required to place a monetary value on any distributional factor and we decline to impose such an unnecessary burden upon the trial court.”). But *marital property* must be valued, *see, e.g., Robinson*, 210 N.C. App. at 324, 707 S.E.2d at 790 (“It is not enough that evidence can be found within the record which could support such classification; the court must actually classify all of the property and make a finding as to the value of all marital property.”), and the trial court found that 401K plan was marital property but did not value it. If the 401K is not marital property, the trial court could have used it as a distributional factor without valuing it; but if it is marital property, it must first be valued as part of the marital estate. *See generally Gum*, 107 N.C. App. at 739, 421 S.E.2d at 791; *Robinson*, 210 N.C. App. at 324, 707 S.E.2d at 790. There is no way to know if the distribution of the marital estate is equal or unequal if there is no finding on the net value of the entire marital estate.

The trial court determines the credibility and weight of the evidence, *see, e.g., Brackney v. Brackney*, 199 N.C. App. 375, 390, 682 S.E.2d 401, 410 (2009) (“[I]t is well-established . . . that when the trial court is the trier of fact, the court is empowered to assign weight to the evidence presented at the trial as it deems appropriate.” (Citation, quotation marks, and brackets omitted)), and it is possible the trial court did not believe Husband’s evidence regarding the value of the 401K. But we are concerned that the trial court’s finding might be based upon the erroneous date of separation in the order. There was evidence, in the form of a letter from the 401K plan administrator, MassMutual Retirement Services Division, of the vested balance of the 401K as of 31 October 2009, the month of the parties’ separation. Yet the trial court found the

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parties separated in October 2007. The trial court would be correct there was no evidence of the value of the 401K in 2007 – but that is not the relevant year because the parties did not separate until 2009. Wife contends the finding of the year 2007 is merely a non-prejudicial clerical error. But considering the trial court’s finding of a lack of evidence of the value of the 401K as of the date of separation, along with the evidence of a letter from the 401K plan administrator valuing the plan as of the date of separation, we cannot say for sure the date error is nonprejudicial. Again, it is possible the trial court did not rely upon the 401K plan administrator’s letter for some other reason, and that would be within the trial court’s discretion, but since we are vacating this order for other reasons, on remand, the trial court should clarify its findings regarding the valuation of the 401K as of the date of separation or its inability to value the plan.

III. Unequal Distribution of the Marital Property

[4] Husband contends that the trial court abused its discretion in granting Wife an unequal distribution because the primary findings of factors supporting the unequal distribution are legally and factually incorrect. Based upon the errors in classification and valuation discussed above, including the absence of a finding of the total value of the net marital estate, we must vacate the order and remand for entry of a new order, but we will address Husband’s argument to avoid potential errors regarding the distributional factors on remand.

North Carolina General Statutes Section 50-20(c) sets out the factors the trial court should consider when determining whether an equal division is equitable. *See* N.C. Gen. Stat. § 50-20(c) (2017). “Where the trial court decides that an unequal distribution is equitable, the court must exercise its discretion to decide how much weight to give each factor supporting an unequal distribution. A single distributional factor may support an unequal division.” *Mugno v. Mugno*, 205 N.C. App. 273, 278, 695 S.E.2d 495, 499 (2010) (citations omitted).

Here, the trial court determined that an unequal distribution of the marital and divisible property was equitable, and the court found these factors as justification for an unequal division:

35. N.C.G.S. § 50-20(c) – Distributional Factors: That in considering whether an equal distribution would be equitable, the Court has considered all of the evidence presented by the parties relating to the statutory factors set out in Chapter 50-20(c) of the North Carolina General Statutes (as more particularly set out in the findings of fact contained in this judgment), and specifically including the following:

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a. N.C.G.S. § 50-20(c)(1): At the time that the property division is to become effective, [Husband] is employed and will have received the majority of his 401K from Electro Switch, as well as having received the majority of, if not all of the benefit for the funds borrowed against the marital residence via the HELOC. [Wife] is receiving the marital residence.

b. N.C.G.S. § 50-20(c)(2): There is no obligation for support arising out of a prior marriage.

c. N.C.G.S. § 50-20(c)(3): The parties were married eighteen (18) years. Both parties are in good mental health. Both parties are limited in what they may do for employment although [Husband] continues to work.

....

e. N.C.G.S. § 50-20(c)(5): [Husband] has obtained loans on his 401K, has received a substantial portion of it to date to the exclusion of [Wife], and will receive all that remains of it.

f. N.C.G.S. § 50-20(c)(6): Both parties contributed to the purchase of the Marital residence and its eventual pay off.

....

i. N.C.G.S. § 50-20(c)(9): The 401K and the equity that remains in the residence are the largest Liquid assets the parties have. There is no sufficient and competent evidence to value [Husband's] 401K, the exact amount of principle (sic) remaining on the HELOC and as a result the exact amount of equity in the Marital Residence.

....

36. An equal distribution of marital and divisible property is not equitable in this matter.

The court found that “[n]o evidence was presented” regarding any of the other factors in N.C. Gen. Stat. § 50-20(c).

The primary factor the trial court used to justify an unequal distribution was (i), but the trial court’s finding “[t]he 401K and the equity

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that remains in the residence are the largest Liquid assets the parties have” presents several problems. First, neither of these marital assets was valued, as discussed above. The second problem is either a serious clerical error or a misunderstanding of the meaning of the term “liquid.” Black’s Law Dictionary defines a liquid asset as “[a]n asset that is readily convertible to cash, such as a marketable security, a note, or an account receivable.” Black’s Law Dictionary (10th ed. 2014). In comparison, an illiquid asset is defined as “[a]n asset that is not readily convertible into cash, usu. because of (1) the lack of demand, (2) the absence of an established market, or (3) the substantial cost or time required for liquidation (*such as real property, even when it is desirable*).” *Illiquid asset*, Black’s Law Dictionary (10th ed. 2014) (emphasis added). A 401K plan is not liquid since it is not readily accessible and any withdrawals prior to retirement incur substantial taxes and penalties. Equity in a home is not liquid because the home must be sold to get access to the equity. *See e.g., Robertson v. Robertson*, 167 N.C. App. 567, 571, 605 S.E.2d 667, 669-70 (2004) (“Although the trial court found defendant could liquidate the above assets to pay the \$52,100.07 distributive award, the only liquid assets readily available to pay the award were two bank accounts totaling \$5,929.38. Wife’s other assets included stock in PSI valued at \$37,336.00, the unencumbered one-half acre lot valued at \$8,920.00, and the personal property valued at \$13,829.68. With the exception of the pension plan, which the trial court found would be difficult to liquidate and might cause unfavorable tax consequences, the trial court failed to make findings concerning the difficulty and possible financial and tax consequences of borrowing money against or liquidating the PSI stock, the one-half acre lot, and the personal property in order to pay the amount of the judgment lien within ninety days. Accordingly, although Wife may in fact be able to pay the distributive award, her evidence is sufficient to raise the question of whether adjusting the award from her to Husband is necessary to offset any adverse financial consequences of using the non-liquid assets.” (Citations, quotation marks, brackets, and ellipses omitted)).

As discussed above on valuation, the remainder of the finding on factor (i) is also erroneous because the marital property was not valued. The trial court found it could not value the marital equity in the home or the 401K plan. It found there was “no sufficient and competent evidence to value [Husband]’s 401K” and that the exact amount of principal remaining on the HELOC and the equity in the marital residence were also unknown. Without valuation of the marital assets, it is impossible to say if a distribution is equal or unequal. *See generally Crowder v. Crowder*, 147 N.C. App. 677, 681, 556 S.E.2d 639, 642 (2001)

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(“The distribution of marital assets entails the court’s determination of an ‘equitable’ division of marital property. The marital property is to be distributed equally, unless the court determines equal is not equitable.” (Citation and quotation marks omitted)). Yet the court nevertheless used these unvalued marital assets in its determination that an unequal distribution was equitable, as evidenced in findings (a), (e), (f), and (i).

Once those findings discussed above are removed, we are left only with its findings: (b) that “[t]here is no obligation for support arising out of a prior marriage” and (c) that “[t]he parties were married eighteen (18) years. Both parties are in good mental health. Both parties are limited in what they may do for employment although [Husband] continues to work.” These factors are essentially descriptions of the parties’ circumstances and while they are relevant, they cannot, standing alone, support the trial court’s conclusion that an unequal distribution is equitable. Since the court based an “unequal” distribution on marital assets that were not valued and on a misunderstanding of “liquid” assets, we hold that the trial court abused its discretion in ordering an unequal distribution.

IV. Conclusion

The trial court’s order on equitable distribution is reversed and we remand to the trial court for further proceedings consistent with this opinion.⁵ On remand, within 30 days after mandate issues on this opinion, either party may file a written request with the trial court for a hearing to present additional evidence or argument, and if a party files a timely request, the trial court shall hold a hearing to “to hear arguments and receive evidence from both parties on remand, in order to address the errors discussed above and to properly identify, classify, and value the parties’ property as required by statutory law and case law.” *Dalgewicz v. Dalgewicz*, 167 N.C. App. 412, 424, 606 S.E.2d 164, 172 (2004). If neither party files a timely written request for hearing on remand, the trial court may, in its sole discretion, determine whether to hold an additional hearing or to enter a new order based upon the evidence presented at the prior hearing.

VACATED AND REMANDED.

Judges DILLON and INMAN concur.

5. Since Wife did not cross-appeal the denial of her claim for post-separation support, the portion of the order addressing post-separation support is not affected by this opinion and shall not be reconsidered on remand.

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& FIRE SPRINKLER CONTRACTORS**

[261 N.C. App. 106 (2018)]

DALE THOMAS WINKLER; AND DJ'S HEATING SERVICE, PETITIONER

v.

NORTH CAROLINA STATE BOARD OF PLUMBING, HEATING
& FIRE SPRINKLER CONTRACTORS, RESPONDENT

No. COA17-873

Filed 21 August 2018

**Licensing Boards—disciplinary action—plumbing, heating, and
fire sprinkler contractors—attorney fees—N.C.G.S. § 6-19.1**

In an action to discipline a contractor (petitioner) who performed work beyond his license qualification, the trial court erred in awarding him attorney fees pursuant to N.C.G.S. § 6-19.1 after his attorney successfully defended him against one of two allegations of misconduct. Based on both the plain language of the statute and legislative intent, section 6-19.1 excludes claims for attorney fees incurred in disciplinary actions by licensing boards from that statute's provisions.

Appeal by Respondent from Order entered 15 May 2017 by Judge Edwin G. Wilson in Watauga County Superior Court. Heard in the Court of Appeals 7 March 2018.

Bailey & Dixon, LLP, by Jeffrey P. Gray, for Petitioner-Appellee.

Young Moore and Henderson, P.A., by Angela Farag Craddock, John M. Fountain, and Reed N. Fountain, for Respondent-Appellant.

Nichols, Choi & Lee, PLLC, by M. Jackson Nichols, for Amicus Curiae, North Carolina Board of Architecture & State Board of Chiropractic Examiners, and Anna Baird Choi, for Amicus Curiae, State Licensing Board for General Contractors.

Janet B. Thoren, for Amicus Curiae, North Carolina Real Estate Commission.

INMAN, Judge.

The North Carolina State Board of Examiners of Plumbing, Heating & Fire Sprinkler Contractors (the “Board”) appeals from an order awarding Dale Thomas Winkler d/b/a DJ's Heating Service (“Winkler”)

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\$29,347.47 in attorneys' fees and costs pursuant to N.C. Gen. Stat. § 6-19.1. Because the statute excludes cases arising out of the defense of a disciplinary action by a licensing board, we reverse the trial court's order.

Facts and Procedural History

This is the second appeal to this Court in this case. Facts relevant to this appeal follow, but additional procedural and factual history of the litigation is included in our decision in the prior appeal. *See Winkler v. State Bd. of Examiners of Plumbing, Heating & Fire Sprinklers Contractors*, __ N.C. App. __, 790 S.E.2d 727 (2016) (*Winkler I*).

In April 2013, the management staff at the Best Western Hotel in Boone, North Carolina, asked Winkler, who held a Heating Group 3 Class II (H-3-II) residential license, to examine the pool heater located at the hotel. Although Winkler was licensed only to work on detached residential HVAC units, he took the job. After examining the pool heater, Winkler determined that it was not working because the gas supply had been turned off. He then located the fuel supply in the pool equipment room, turned it on, and the pool heater again worked.

Days later, on 16 April 2013, two guests died in Room 225 of the hotel, which was above the pool equipment room. Hotel management closed the room until a gas fireplace in the room could be checked for leaks. At the time, the cause of the guests' death had yet to be determined.

Hotel management hired Winkler to examine the fireplace in Room 225 and the ventilation system for the pool heater. Winkler "soaped" the gas lines on both the fireplace and the pool heater and determined there were no gas leaks. Winkler did not, however, check for carbon monoxide, because he did not have the proper equipment. Winkler told hotel management that the ventilation system seemed to be working.

Following Winkler's inspections, hotel staff reopened Room 225 in late May 2013. On 8 June 2013, a third guest died in the room and a fourth was injured.

After the third guest died, autopsies and toxicology reports for the first two guests were completed and indicated that they had died from lethal concentrations of carbon monoxide. Toxicology reports for the third and fourth guests also indicated excessive levels of carbon monoxide in their blood.

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The Board undertook its own investigation after issuance of the toxicology reports. Board investigators determined that carbon monoxide from the pool heater ventilation system could enter Room 225 through openings near the fireplace logs and an HVAC unit. The investigators also observed corrosion over a substantial portion of the ventilation pipe holes for the pool heater. In connection with the Board's investigation, Winkler signed an affidavit swearing that he had never performed work for which he was not licensed.

Winkler ultimately admitted to the Board in a disciplinary licensing proceeding that he had installed a replacement HVAC system in the hotel lobby, performing work beyond his license qualification. The Board concluded that Winkler had engaged in misconduct in violation of his license and suspended his license for one year. The Board also required Winkler to enroll in several courses to remedy the deficiencies in his knowledge.

Winkler appealed the Board's decision to the Watauga County Superior Court. Following a hearing, the court affirmed the Board's decision in its entirety. Winkler then appealed to this Court on the ground that the Board lacked jurisdiction to discipline Winkler for his incompetence in working on the pool heater. He did not challenge the discipline for his misconduct related to the HVAC system in the hotel lobby.

On 20 September 2016, this Court held that the Board did not have jurisdiction to discipline Winkler for the pool heater inspection. *Winkler I*, __ N.C. App. at __, 790 S.E.2d at 739. This Court remanded the matter back to the Board for entry of a new order based solely on Winkler's misconduct related to the installation of the HVAC system. *Id.* at __, 790 S.E.2d at 739.

The Board reheard the matter, and, on 19 December 2016, issued a revised disciplinary order placing Winkler on probation for 12 months and requiring him to complete coursework and other conditions of probation.

On 24 October 2016, Winkler filed a motion for attorneys' fees and costs in Watauga County Superior Court. Winkler's motion sought fees pursuant to N.C. Gen. Stat. §§ 6-19.1 and 6-20 based on his successful defense against allegations of misconduct that the Board knew, or should have known, was outside the Board's statutory authority. The trial court entered an order on 2 May 2017 awarding Winkler \$29,347.47 in attorneys' fees and costs.

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The Board timely appealed and moved to stay the order awarding attorneys' fees pending the resolution of this appeal. The motion to stay was granted on 7 June 2017.

Analysis

The Board argues that the plain language of N.C. Gen. Stat. § 6-19.1—the statute upon which Winkler based his claim for attorneys' fees—along with the legislative intent of the statute, excludes claims for attorneys' fees incurred in disciplinary actions by licensing boards from the purview of the statute. We agree.

1. Standard of Review

We review the trial court's interpretation of N.C. Gen. Stat. § 6-19.1 *de novo*. See, e.g., *Applewood Props., LLC v. New S. Props., LLC*, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013) (holding that questions of statutory construction are questions of law reviewed *de novo*).

2. Statutory Construction

Section 6-19.1 of the North Carolina General Statutes governs the trial court's ability to award attorneys' fees for a prevailing party in certain civil actions. The relevant portion of the statute provides as follows:

(a) In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, *or a disciplinary action by a licensing board*, brought by the State or brought by a party who is contesting State action pursuant to [N.C. Gen. Stat. §] 150B-43 or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency if:

- (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
- (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust. . . .

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N.C. Gen. Stat. § 6-19.1(a) (2017) (emphasis added). Winkler and the Board dispute whether the legislature intended for the phrase “or a disciplinary action by a licensing board” to include such proceedings within the scope of the statute, or to exclude them.

The Board argues that the phrase “other than” immediately following the phrase “any civil action” removes adjudications for establishing or fixing a rate and disciplinary actions by licensing boards from the overarching category of “any civil action” provided for by the statute.¹ This interpretation would result in the following reading: “**In any civil action—other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board—brought by the State . . .**” The effect of this interpretation is to exclude from the statute both adjudications for the purpose of establishing or fixing a rate and disciplinary actions by licensing boards.

Winkler argues, on the other hand, that the phrase “a disciplinary action by a licensing board” is a second classification, in addition to “any civil action,” to which the statute applies. This interpretation leads to the following reading: “**In any civil action—other than an adjudication for the purpose of establishing or fixing a rate—or a disciplinary action by a licensing board, brought by the State . . .**” The effect of this interpretation is to include disciplinary actions by licensing boards within the purview of the statute, while excluding only adjudications for the purpose of establishing or fixing a rate.

a. Plain Language of N.C. Gen. Stat. § 6-19.1

“The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent.” *Dickson v. Rucho*, 366 N.C. 332, 339, 737 S.E.2d 362, 368 (2013) (internal quotation marks and citation omitted). The first place courts look to ascertain the legislative intent is the plain language of the statute. See *First Bank v. S&R Grandview, L.L.C.*, 232 N.C. App. 544, 546, 755 S.E.2d 393, 394 (2014) (“The plain language of a statute is the primary indicator of legislative intent.” (citation omitted)); see also *N.C. Dep’t of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) (“Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used.”).

1. This argument is joined by the North Carolina Boards of Architecture, Chiropractic Examiners, and General Contractors and the Real Estate Commission in their joint *amicus curiae* brief.

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The North Carolina Supreme Court has further explained that “[a] statute must be construed, if possible, so as to give effect to every provision, it being presumed that the Legislature did not intend any of the statute’s provisions to be surplusage.” *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 216, 388 S.E.2d 134, 140 (1990) (internal quotation marks and citation omitted).

Based on the plain language of Section 6-19.1, including not only the words but also the punctuation and ordering of phrases, we reach the conclusion that disciplinary actions by licensing boards are not within the scope of the statute.

“The North Carolina appellate courts have long held that placement of punctuation within a statute is used as a means of ‘making clear and plain’ the English language therein; therefore, punctuation and placement should be regarded in the process of statutory interpretation.” *Falin v. Roberts Co. Field Servs., Inc.*, 245 N.C. App. 144, 149, 782 S.E.2d 75, 79 (2016) (quoting *Stephens Co. v. Lisk*, 240 N.C. 289, 293-94, 82 S.E.2d 99, 102 (1954)). “Ordinary rules of grammar apply when ascertaining the meaning of a statute, and the meaning must be construed according to the context and approved usage of the language.” *Dunn v. Pacific Employers Ins. Co.*, 332 N.C. 129, 134, 418 S.E.2d 645, 648 (1992) (citations omitted).

We start by examining the language and structure of the first half of N.C. Gen. Stat. § 6-19.1, which contains the provision in dispute: “In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action pursuant to G.S. 150B-43 or any other appropriate provisions of law[.]” N.C. Gen. Stat. § 6-19.1.

The legislature’s use of the word “any” before the phrase “civil action” differentiates the phrase from the two phrases following “other than”—“an adjudication for the purpose of establishing or fixing a rate” and “a disciplinary action by a licensing board”—each introduced with a singular indefinite article, respectively “an” and “a.” The singular indefinite articles convey that rate cases and licensing board actions are separate and distinct members of the class of “any civil action,” and therefore are excluded from the statute.

The Board argues, and we agree, that the words “other than” exclude from the broader class of “any civil actions” certain specified actions listed immediately after the words “other than.” It is undisputed that the

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phrase “an adjudication for the purpose of establishing or fixing a rate” is modified by the exclusionary words of “other than.” It follows that the exclusionary words also modify the phrase “a disciplinary action by a licensing board,” which similarly begins with a singular indefinite article. This interpretation is consistent with the rule of statutory construction that “[e]very element of a parallel series must be a functional match of the others (word, phrase, clause, sentence) and serve the same grammatical function in the sentence (e.g., noun, verb, adjective, adverb).” *Falin*, 245 N.C. App. at 150, 782 S.E.2d at 79. Had the legislature sought to include disciplinary actions by licensing boards within the scope of the statute, it would not have used a single indefinite article and a singular form of the term “action.”

This interpretation is also consistent with the structure of N.C. Gen. Stat. § 6-19.1. A series of commas offsets the exclusions following “other than” from the category of actions within “any civil action”: “In any civil action [comma] *other than* an adjudication for the purpose of establishing or fixing a rate [comma] or disciplinary action by a licensing board [comma] brought by the State” By using the last comma to separate the phrase “disciplinary action by a licensing board” from the phrase “brought by the State,” the legislature extended the statutory exclusion to disciplinary actions. Had the legislature intended otherwise, there would have been no need for the third comma. This structural interpretation is consistent with prior decisions by the North Carolina Supreme Court, which have quoted N.C. Gen. Stat. § 6-19.1 in a simplified form, removing those offset exclusions as follows: “In any civil action . . . brought by the State or brought by a party who is contesting State action pursuant to G.S. 150B-43” *See, e.g., Crowell Constructors, Inc. v. Cobey*, 342 N.C. 838, 842-43, 467 S.E.2d 675, 678 (1996); and *Able Outdoor, Inc. v. Harrelson*, 341 N.C. 167, 169-70, 459 S.E.2d 626, 627 (1995). In eliminating the exclusions and not including a comma to separate “any civil action” from “brought by the State,” these prior decisions illustrate the syntax of the statute—*i.e.*, the phrase “[i]n any civil action . . . brought by the State” is separate and distinct from the phrase “other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board[.]” This distinction exists as a means of delineating what is and is not within the scope of the statute and supports our interpretation of disciplinary actions as being categorized with the other exception to the statute.

Because the phrase “a disciplinary action by a licensing board” is designated with the indefinite article “a,” and is separated from the rest

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of the statute by way of commas, we hold that the plain language of the statute conveys the legislature's intent to exclude disciplinary actions by licensing boards from the purview of the N.C. Gen. Stat. § 6-19.1.

b. Statutory Interpretation of N.C. Gen. Stat. § 6-19.1

In addition to the plain language of N.C. Gen. Stat. § 6-19.1, the statutory interpretation and legislative history of the statute support excluding disciplinary actions by licensing boards from its scope.

Neither Section 6-19.1 nor Chapter 6 of the General Statutes in its entirety defines “any civil action” or “a disciplinary action by a licensing board.” This Court, in recognizing a similar lack of definitions in Chapter 6 for the terms “agency” or “State action,” has turned to Chapter 150B of the North Carolina General Statutes—specifically the North Carolina Administrative Procedure Act (“APA”)—because of its reference in Section 6-19.1. *Izydore v. City of Durham*, 228 N.C. App. 397, 400, 746 S.E.2d 324, 326 (2013).

The APA sets forth the procedure for a party to appeal for judicial review from a final decision in a “contested case,” when the party has exhausted all administrative remedies. N.C. Gen. Stat. § 150B-43 (2017). A contested case is defined as “an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person’s rights, duties, or privileges, including *licensing* or the levy of a monetary penalty. . . .” N.C. Gen. Stat. § 150B-2(2) (emphasis added). Licensing is defined as “any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license.” N.C. Gen. Stat. § 150B-2(4). Therefore, disciplinary actions by a licensing board necessarily fall within the scope of the APA’s definition of a “contested case.”

This Court, in *Walker v. N.C. Coastal Resources Comm’n*, 124 N.C. App. 1, 476 S.E.2d 138 (1996), addressed whether attorneys’ fees may be awarded pursuant to N.C. Gen. Stat. § 6-19.1 in contested cases as defined by the APA. The Court drew a distinction between the “administrative review” portion of a case—*i.e.*, the agency proceedings—and the “judicial review” portion of a case—*i.e.*, the appeal to a general court of justice from the final administrative decision. *Id.* at 11, 476 S.E.2d at 144. *Walker* held that the “judicial review” portion of the case falls within the definition of “any civil action,” and accordingly affirmed an award of attorneys’ fees pursuant to N.C. Gen. Stat. § 6-19.1 for the judicial review phase of the case. *Id.* at 12, 476 S.E.2d at 144-45. However, the Court held that “an administrative hearing under G.S. 150B-22 *et seq.* is not a

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‘civil action . . . brought . . . pursuant to G.S. 150A-43 [now 150B-43][,]’ ” and therefore N.C. Gen. Stat. § 6-19.1 did not provide for an award of attorneys’ fees for the “administrative review” portion of the case. *Id.* at 12, 476 S.E.2d at 145 (citations omitted) (alterations in original).

Following *Walker*, the General Assembly amended N.C. Gen. Stat. § 6-19.1, adding the following language: “. . . the court may, in its discretion, allow the prevailing party to recover reasonable attorney’s ~~fees~~ fees, including attorney’s fees applicable to the administrative review portion of the case, in contested cases under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency . . .” 2000 N.C. Sess. Law 2000-190, § 1. The result of this amendment was that, in contested cases under Article 3 of Chapter 150B—cases heard by the Office of Administrative Hearings—a trial court may award attorneys’ fees for the administrative review proceeding, contrary to the holding in *Walker*.

By amending Section 6-19.1 after *Walker* to provide specifically for recovery of attorneys’ fees incurred in the administrative review portions of Article 3 cases, and omitting any mention of the administrative review portions of Article 3A cases—the Article under which this case presently arises—the legislature revealed its intent not to provide for recovery of attorneys’ fees incurred in disciplinary actions by licensing boards. *See, e.g., N.C. Dep’t of Revenue v. Hudson*, 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009) (“When a legislative body includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the legislative body acts intentionally and purposely in the disparate inclusion or exclusion.” (internal quotation marks, alteration, and citation omitted)).

Accordingly, we conclude that, when read as a whole and based on the legislative history of N.C. Gen. Stat. § 6-19.1, the language “a disciplinary action by a licensing board” was intended to exclude such actions from the purview of the statute.

Conclusion

For the foregoing reasons, we hold that the trial court erred as a matter of law by awarding Winkler attorneys’ fees pursuant to N.C. Gen. Stat. § 6-19.1 because the language of Section 6-19.1 excludes “a disciplinary action by a licensing board” from the statute. We therefore reverse the trial court’s order.

REVERSED.

Judges ELMORE and BERGER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 AUGUST 2018)

BOND v. MANFREDO No. 17-1425	Mecklenburg (15CVD5249)	Reverse in Part and Remand
BRUBACH v. PETERSON No. 17-1200	New Hanover (16CVS347)	Affirmed
BURNS v. KINGDOM IMPACT GLOBAL MINISTRIES, INC. No. 17-928	Cumberland (13CVS8726)	Modified and affirmed in part; vacated and remanded in part
CARTER v. BAUGHMAN No. 18-51	New Hanover (15CVS2192)	Appeal dismissed.
DA SILVA v. WAKEMED No. 17-820-2	Wake (15CVS12051)	Reversed in Part; Vacated in Part; Remanded
DAUGHTRIDGE v. TANAGER LAND, LLC No. 17-554	Halifax (15CVS1085)	Affirmed
DAVFAM, LLC v. DAVIS No. 18-43	Alleghany (16CVS89)	Affirmed
EMERT v. SMITH No. 17-1121	Mecklenburg (14CVS5143)	Affirmed
GAUNT v. GUY M. BEATY & CO., INC. No. 17-851	Rowan (16CVS2309)	Affirmed
IN RE A.H. No. 18-207	Yadkin (16JA7)	Affirmed
IN RE I.A.B. No. 18-40	Cumberland (14JT128)	Affirmed
KHAJA v. HUSNA No. 17-763	Wake (11CVD16365)	Affirmed
KOZEC v. MURPHY No. 17-919	Wake (10CVD20375)	Vacated
N.C. AMBULATORY SURGICAL CTR. ASS'N v. N.C. INDUS. COMM'N No. 17-701	Wake (17CVS144)	Dismissed
PURA VIDA MGMT. CORP. v. ADIO MGMT. CO., INC. No. 17-905	Cumberland (16CVS1521)	Vacated

STATE v. ARACENA No. 17-1253	Guilford (16CRS81358) (16CRS81360)	No Error
STATE v. BATES No. 17-970	Rutherford (15CRS2289) (15CRS53380)	No Error
STATE v. CHARETTE No. 17-1238	Nash (16CRS52858)	No Error
STATE v. COLE No. 17-732	Buncombe (14CRS89850)	No error in part; Remanded in part
STATE v. COLLINS No. 17-849	Wilkes (11CRS51281-82) (11CRS51343-44)	No Error
STATE v. CONNER No. 17-1293	Watauga (16CRS50232) (16CRS576)	No Error
STATE v. CROWDER No. 17-393	Mecklenburg (14CRS200723) (15CRS19239)	No Error
STATE v. ELLER No. 17-1124	Davidson (15CRS51338)	Affirmed
STATE v. EVANS No. 17-976	Iredell (12CRS54647-48) (12CRS54927)	No Error
STATE v. HEARD No. 17-1242	Mecklenburg (15CRS205783-785) (15CRS205787-788)	No Error
STATE v. LONG No. 17-1291	Dare (15CRS50302)	No Error
STATE v. McMILLAN No. 17-1305	Cumberland (15CRS55431-32)	No Error
STATE v. SANDERLIN No. 17-1363	Chowan (13CRS50583)	Affirmed

STATE v. WHITFIELD
No. 17-184

Cabarrus
(13CRS54958)
(13CRS54961)
(13CRS54980)
(13CRS54981)

Vacated and Remanded
for New Trial as to
defendant Whitfield;
No Error in Part,
Remanded for Clerical
Error in part as to
defendant Banner

STATE v. WOLFE
No. 17-909

Watauga
(16CRS50635)

NO PREJUDICIAL
ERROR.

WHITMORE v. WHITMORE
No. 17-988

Camden
(15CVD59)

Affirmed

DE LUCA v. STEIN

[261 N.C. App. 118 (2018)]

FRANCIS X. DE LUCA AND THE NEW HANOVER COUNTY BOARD
OF EDUCATION, PLAINTIFFS

v.

JOSH STEIN, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF
NORTH CAROLINA, DEFENDANT

AND

NORTH CAROLINA COASTAL FEDERATION AND
SOUND RIVERS, INC., INTERVENORS

No. COA17-1374

Filed 4 September 2018

1. Jurisdiction—standing—order regarding standing not appealed—merits considered on appeal

The Court of Appeals considered the merits of an argument that plaintiffs lacked standing in a lawsuit against the attorney general—even though defendant parties did not appeal from the trial court’s earlier order concluding plaintiffs had standing—because standing is an issue of subject matter jurisdiction and can be raised at any time.

2. Jurisdiction—standing—taxpayer—funds for public education—allegations of basis for standing

A North Carolina citizen lacked standing to bring an action against the state attorney general alleging a violation of the state constitution for failure to use certain funds for public education, where that citizen failed to allege any basis upon which he could sue solely in his capacity as a taxpayer.

3. Jurisdiction—standing—county board of education—intended beneficiary of funds

A county board of education had standing to bring an action against the N.C. attorney general alleging a violation of the state constitution for failure to use certain funds for public education, because, viewing the allegations in the light most favorable to the board of education, the board would be an intended beneficiary of the funds at issue.

4. Constitutional Law—North Carolina—funding of public education—civil penalties—punitive or in lieu of enforcement

The trial court erred by concluding that, as a matter of law, payments specified in an agreement between the attorney general and a meat-processing company (following the contamination of water supplies by swine waste lagoons) were not civil penalties required to fund public education pursuant to the state constitution. Genuine

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[261 N.C. App. 118 (2018)]

issues of material fact existed as to whether the payments under the agreement were intended to be punitive or in lieu of enforcement actions asserted against the company and its subsidiaries.

Judge BRYANT dissenting.

Appeal by plaintiff from order entered 12 October 2017 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 20 June 2018.

Stam Law Firm, PLLC, by Paul Stam and Amy C. O'Neal, for plaintiff-appellants.

Attorney General Joshua H. Stein, by Special Deputy Attorneys General Marc Bernstein and Jennie Wilhelm Hauser, for defendant-appellee Joshua H. Stein in his capacity as Attorney General of the State of North Carolina.

Southern Environmental Law Center, by Mary Maclean Asbill, Brooks Rainey Pearson and Blakely E. Hildebrand, for intervenor-appellees North Carolina Coastal Federation and Sound Rivers, Inc.

Tharrington Smith, L.L.P., by Deborah R. Stagner and Lindsay Vance Smith, for amicus curiae North Carolina School Boards Association.

TYSON, Judge.

Plaintiffs' appeal asserts the trial court erred in concluding, as a matter of law, that payments specified in an agreement between the Attorney General of North Carolina and Smithfield Foods, Inc., and its subsidiaries are not civil penalties required to be used to fund public education pursuant to Article IX, § 7 of the North Carolina Constitution. The trial court's order granting the defendant's motion for summary judgment and denying the plaintiffs' cross-motion for summary judgment is reversed in part and remanded for trial.

I. Background

On 25 July 2000, Michael F. Easley, in his capacity as Attorney General of North Carolina, entered into an agreement (the "Agreement") with Smithfield Foods, Inc. ("Smithfield") and several of its subsidiaries,

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Brown's of Carolina, Inc., Carroll's Foods, Inc., Murphy Farms, Inc., Carroll's Foods of Virginia, Inc., and Quarter M Farms, Inc. (collectively, the "Companies").

Daniel Oakley, the former Division Director of the North Carolina Department of Justice's Environmental Division at the time the Agreement was negotiated and entered into, stated in an affidavit:

The background for the [Agreement] was a five-year period of time, from 1995 to 2000, when ruptured or flooded swine waste lagoons, not all of them Smithfield's, had spilled millions of gallons of waste into North Carolina waterways, contaminating surface waters and killing aquatic life, while seepage from waste lagoons impacted groundwater supplies.

In the Agreement, the Department of Environmental Quality is referred to under its previous name of the Department of Environment and Natural Resources, or DENR. As of 1 July 2015, the agency was formally renamed the North Carolina Department of Environmental Quality. 2015 S.L. 241, § 14.30.(c), eff. July 1, 2015. We refer to the agency throughout this opinion under its current name of the Department of Environmental Quality ("DEQ").

Under the terms of the Agreement, the Companies entered into it for the purpose of undertaking "a series of environmental initiatives intended to preserve and enhance water quality in eastern North Carolina." To support "environmental initiatives," the Companies agreed to commit funds to "environmental enhancement activities." The Agreement specified these funds would be "paid to such organizations or trusts as the Attorney General will designate. The funds will be used to enhance the environment of the State, including eastern North Carolina, to obtain environmental easements, construct or maintain wetlands and such other environmental purposes, as the Attorney General deems appropriate."

In the Agreement, the Companies committed, among other things, to "pay each year for 25 years an amount equal to one dollar for each hog in which the Companies . . . have had any financial interest in North Carolina during the previous year, provided, . . . that such amount shall not exceed \$2 million in any year." To facilitate these payments, the Companies maintain an escrow account into which funds are deposited. The Attorney General maintains the sole authority to direct the escrow agent to disburse funds to grant recipients, who are chosen by the Attorney General.

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Under the Agreement, the Attorney General may consult with the Companies, DEQ, and “any other groups or individuals he deems appropriate and may appoint any advisory committees he deems appropriate[,]” in administering the grant program.

To facilitate the administration of the funds in escrow, the Attorney General established the Environmental Enhancement Grant Program (“EEG Program”). Every year since the Agreement was established, the Attorney General has received proposals from governmental agencies and nonprofit organizations to receive Environmental Enhancement Grants (“EEGs”). A panel consisting of representatives from the Department of Justice, DEQ, the North Carolina Department of Natural and Cultural Resources, academic institutions, and environmental nonprofit organizations reviews the EEG proposals and makes recommendations to the Attorney General. Representatives from Smithfield could also submit recommendations separate from the panel.

The Attorney General exercises sole discretion over the selection of grant recipients and approval of the amounts awarded, up to a maximum of \$500,000 per award. After the Attorney General selects the grant recipients, the funds are distributed as reimbursements for expenses already incurred by the grant recipients. The Attorney General has awarded grants totaling more than \$24 million since the Agreement was signed.

On 18 October 2016, Francis X. De Luca (“De Luca”), a citizen and resident of Wake County, North Carolina, filed a complaint against the Attorney General of North Carolina, Roy Cooper, in his official capacity. In his complaint, De Luca sought a preliminary and permanent injunction to prevent the Attorney General from distributing monies paid under the Agreement to any entities other than to the State’s Civil Penalty and Forfeiture Fund.

The Attorney General filed a motion to dismiss on 19 December 2016. On 25 January 2017, while the motion to dismiss was pending, De Luca filed an amended complaint, which added the New Hanover County Board of Education (“NHCBE”) as a party-plaintiff. Joshua H. Stein (“the Attorney General”), in his official capacity as the current Attorney General of North Carolina, was substituted as the defendant. The Attorney General subsequently filed an amended motion to dismiss.

On 14 June 2017 and 16 June 2017, respectively, De Luca and the NHCBE (collectively, “Plaintiffs”) filed a motion for preliminary injunction and a motion for summary judgment. The trial court heard

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Plaintiffs' motion for preliminary injunction and the Attorney General's amended motion to dismiss on 27 June 2017.

The trial court denied the Attorney General's motion to dismiss and granted Plaintiffs' request for a preliminary injunction, based upon the court's finding that Plaintiffs were "likely to prevail" and "the public interest favors the granting of a preliminary injunction." The Attorney General filed an answer to the amended complaint on 17 July 2017. On 21 July 2017, upon consent of the parties, an amended injunction was entered to clarify the preliminary injunction would only apply to grants awarded after 30 September 2016.

On 21 August 2017, two environmental organizations, who had previously received grants under the Agreement, the North Carolina Coastal Federation, Inc. and Sound Rivers, Inc. (collectively, "Intervenors"), filed a motion to intervene. On 22 September 2017, Plaintiffs served their opposition to the motion to intervene and renewed their motion for summary judgment. The same day, the Attorney General filed a motion for summary judgment. On 28 September 2017, the Intervenors filed a motion for leave to file a memorandum of law in support of the Attorney General's motion for summary judgment, and the North Carolina School Boards Association ("NCSBA") filed a motion for leave to file an *amicus curiae* brief in support of Plaintiffs' motion for summary judgment.

The parties' cross-motions for summary judgment, Intervenors' motion to intervene, and NCSBA's motion for leave to file an *amicus* brief were heard by the trial court on 5 October 2017. On 12 October 2017, the trial court entered its order, which granted the Attorney General's motion for summary judgment, denied Plaintiffs' motion for summary judgment, dismissed Plaintiffs' complaint with prejudice, and dissolved the preliminary injunction previously entered by the trial court. The trial court also entered orders granting Intervenors' motion to intervene and NCSBA's motion for leave to file an *amicus* brief. On appeal, Plaintiffs do not challenge the trial court's order, to the extent it granted Intervenors' motion to intervene.

From the trial court's order granting the Attorney General's motion for summary judgment and denying their motion for summary judgment, Plaintiffs filed timely notice of appeal on 25 October 2017.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2017) as an appeal from a final judgment of the superior court.

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III. Standard of Review

“Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [a] party is entitled to judgment as a matter of law.” *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citation and internal quotation marks omitted); see N.C. Gen. Stat. § 1A-1, Rule 56(c).

A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff’s case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.

Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial. To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (citations and quotation marks omitted), *aff’d per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

“Our standard of review of an appeal from summary judgment is *de novo* [.]” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). “The evidence produced by the parties is viewed in the light most favorable to the non-moving party.” *Hardin v. KCS Int’l, Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (citation omitted). “If the evidentiary materials filed by the parties indicate that a genuine issue of material fact does exist, the motion for summary judgment must be denied.” *Vernon, Vernon, Wooten, Brown & Andrews, P.A. v. Miller*, 73 N.C. App. 295, 298, 326 S.E.2d 316, 319 (1985).

Here, both parties moved for summary judgment and assert no genuine issues of material fact exist. Under our *de novo* review of an order granting summary judgment, we are not bound by the trial court’s

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conclusion or the parties' contention that no genuine issues of material fact exist. *See MCC Outdoor, LLC v. Town of Wake Forest*, 222 N.C. App. 70, 75, 729 S.E.2d 694, 697 (2012) (denying summary judgment on both the plaintiff's and the defendant's motions after determining genuine issues of material fact existed).

IV. Analysis***A. Standing***

[1] Intervenors argue Plaintiffs do not have standing to bring suit over the grant funds provided in the Agreement. Standing refers to "a party's right to have a court decide the merits of a dispute[.]" and provides the courts of this State subject matter jurisdiction to hear a party's claims. *Teague v. Bayer AG*, 195 N.C. App. 18, 23, 671 S.E.2d 550, 554 (citation and internal quotation marks omitted).

"[S]tanding is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction and can be challenged at any stage of the proceedings, even after judgment." *Willowmere Cmty. Ass'n, Inc. v. City of Charlotte*, 370 N.C. 553, 561, 809 S.E.2d 558, 563-64 (2018) (internal quotation marks and citations omitted). "Standing is jurisdictional in nature and consequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of the case are judicially resolved." *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004).

Standing is a question of law which this Court reviews *de novo*. *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 51 (2002), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003).

The Attorney General initially asserted De Luca lacked standing in a Rule 12(b)(6) motion to dismiss. The trial court ruled De Luca and NHCBE had standing in its 14 July 2017 order granting Plaintiffs' request for a preliminary injunction. The Attorney General subsequently reasserted Plaintiffs' lack of standing in a brief in support of his motion for summary judgment. The trial court expressly declined to revisit the issue of standing in its 12 October 2017 order, which granted Defendants' motion for summary judgment. The trial court's order states:

In a prior order of the Superior Court, the Honorable Robert Hobgood presiding, the Court found that Plaintiffs DeLuca and the New Hanover Board of Education each had standing. Although Defendant raises this issue anew

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in arguing the current motion, the prior order of the Court will not be revisited by the undersigned.

Intervenors, but not the Attorney General, argue on appeal that the Plaintiffs lack standing. Neither the Attorney General nor the Intervenors appealed from the trial court's earlier order in which it concluded Plaintiffs each had standing. Nevertheless "[s]tanding is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction," *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878-79, *disc. review denied*, 356 N.C. 610, 574 S.E.2d 474 (2002), and "[a] challenge to subject matter jurisdiction may be made at any time." *Whittaker v. Furniture Factory Outlet Shops*, 145 N.C. App. 169, 172, 550 S.E.2d 822, 824 (2001) (citations, quotation marks, and ellipses in original omitted). Because, "subject matter jurisdiction may not be waived, and this Court has not only the power, but the duty to address the trial court's subject matter jurisdiction[.]" we address Intervenors arguments concerning standing. *Rinna v. Steven B.*, 201 N.C. App. 532, 537, 687 S.E.2d 496, 500 (2009).

1. De Luca's Standing

[2] With regard to Plaintiff De Luca, Intervenors argue De Luca's standing as a taxpayer is "limited to challenges against the government for misuse or misappropriation of *public funds*." (Emphasis original). Intervenors contend this case does not involve public or taxpayer funds because the grant funding at issue is provided by private companies. This Court addressed the question of taxpayer standing to bring suit under Article IX, § 7 of the North Carolina Constitution in *Fuller v. Easley*, 145 N.C. App. 391, 553 S.E.2d 43 (2001).

In *Fuller*, the plaintiff brought an action against then Attorney General Easley, alleging the Attorney General had improperly diverted proceeds from numerous lawsuits to a "public service message campaign." *Fuller*, 145 N.C. App. at 393-94, 553 S.E.2d at 45-46. The plaintiff alleged the lawsuit proceeds were required to be used to fund public education pursuant to Article IX, § 7 of the State Constitution. *Id.* at 396, 553 S.E.2d at 47. The plaintiff brought the suit in his capacity as a taxpayer of Wake County. *Id.* at 395, 553 S.E.2d at 46. The trial court dismissed the plaintiff's complaint for reasons unspecified in its order. *Id.* at 394, 553 S.E.2d at 46.

On appeal, the plaintiff argued the trial court improperly dismissed his complaint, in part, for lack of standing. *Id.* In addressing the plaintiff's arguments, this Court recited the rules regarding taxpayer standing, as follows:

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Generally, an individual taxpayer has no standing to bring a suit in the public interest. *Green v. Eure, Secretary of State*, 27 N.C. App. 605, 608, 220 S.E.2d 102, 105 (1975). However, the taxpayer may have standing if he can demonstrate:

[A] tax levied upon him is for an unconstitutional, illegal or unauthorized purpose[;] that the carrying out of [a] challenged provision will cause him to sustain personally, a direct and irreparable injury[;] or that he is a member of the class prejudiced by the operation of [a] statute.

Texfi Industries v. City of Fayetteville, 44 N.C. App. 268, 270, 261 S.E.2d 21, 23 (1979) (citations omitted). Our review of plaintiff's complaint reveals no allegations which allow him to sue as an individual taxpayer.

Nonetheless, plaintiff may have had standing to bring a taxpayer action, not as an individual taxpayer, but on behalf of a public agency or political subdivision, if "the proper authorities neglect[ed] or refus[ed] to act." *Guilford County Bd. of Comrs. v. Trogdon*, 124 N.C. App. 741, 747, 478 S.E.2d 643, 647 (1996) (quoting *Branch v. Board of Education*, 233 N.C. 623, 625, 65 S.E.2d 124, 126 (1951)). To establish standing to bring an action on behalf of public agencies and political divisions, a taxpayer must allege

that he is a taxpayer of [that particular] public agency or political subdivision, . . . [and either,] "(1) there has been a demand on and refusal by the proper authorities to institute proceedings for the protection of the interests of the political agency or political subdivision; or (2) a demand on such authorities would be useless."

Id. (citation omitted).

Id. at 395-96, 553 S.E.2d at 46-47. This Court concluded the plaintiff in *Fuller* lacked standing because he had "failed to allege that the Wake County Board of Education or any other Board of Education refused to bring a suit to recover funds, that he requested the Board do so, or that such a request would be futile." *Id.* at 396, 553 S.E.2d at 47.

Upon reviewing Plaintiffs' complaint, Plaintiffs have failed to allege any basis upon which De Luca may sue solely upon his capacity as a

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taxpayer. De Luca has not alleged that: (1) the payments at issue constitute an illegal or unconstitutional tax; (2) the Agreement has caused him a personal, direct, and irreparable injury; or, (3) he is a member of a class prejudiced by the Agreement. *See Texfi*, 44 N.C. App. at 270, 261 S.E.2d at 23.

De Luca's complaint also fails to allege he had made any demand upon proper authorities to bring suit, or that such a demand would be futile or useless. *See Trogdon*, 124 N.C. App. at 747, 478 S.E.2d at 647. Under our precedents, De Luca has not alleged a basis to sustain his standing to challenge the Attorney General's alleged violation of Article IX, § 7 of our State Constitution. *See Fuller*, at 394, 553 S.E.2d at 46.

2. NHCBE's Standing

[3] Intervenor's also argue NHCBE does not have standing because it has not demonstrated "any injury in fact from the creation or execution of the Smithfield Agreement" and "[n]either plaintiff has presented any evidence to support a claim that the Agreement has deprived them of payments to which they are entitled." We disagree.

Taking the allegations in Plaintiffs' amended complaint as true and the monies paid by the Companies under the Agreement as penalties, then NHCBE would be an intended beneficiary of a portion of those monies under Article IX, § 7 of the State Constitution and under N.C. Gen. Stat. § 115C-457.2 (2017), which requires all "civil penalties, civil forfeitures, and civil fines" to be placed in the Civil Penalty and Forfeiture Fund for the benefit of the public schools.

Intervenor's argument that NHCBE has failed to demonstrate standing is dependent upon viewing the allegations in Plaintiffs' amended complaint in light of the evidence in the record. However, whether a party has standing

is determined at the time of the filing of a complaint. "Our courts have repeatedly held that standing is measured at the time the pleadings are filed. The Supreme Court has explained that '[w]hen standing is questioned, the proper inquiry is whether an actual controversy existed' when the party filed the relevant pleading." *Quesinberry v. Quesinberry*, [196 N.C. App. 118, 123], 674 S.E.2d 775, 778 (2009) (citation omitted).

Metcalf v. Black Dog Realty, LLC, 200 N.C. App. 619, 625, 684 S.E.2d 709, 714 (2009).

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Viewing the allegations in Plaintiffs' complaint in the light most favorable to NHCBE, NHCBE would be an intended beneficiary of the monies the Companies have paid or are obligated to pay under the Agreement pursuant to Article IX, § 7 of the State Constitution. NHCBE has alleged that they have been deprived of money to which they are constitutionally entitled, and have consequently alleged an injury in fact. NHCBE has standing to maintain this action against the Attorney General and Intervenor. Intervenor's arguments are overruled.

B. N.C. Constitution Article IX, § 7

[4] Plaintiffs and the NCSBA argue the trial court erred in granting the Attorney General's motion for summary judgment, and denying Plaintiffs' motion, because the monies paid by the Companies under the Agreement are "penalties" pursuant to Article IX, § 7 of the North Carolina Constitution, as a matter of law. N.C. Const. art. IX, § 7.

Article IX, § 7 mandates "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools." N.C. Const. art. IX, § 7(a). Supplementing funding for public schools with proceeds from "penalties, forfeitures, and fines" as unbudgeted, non-recurring sources of revenue reflects North Carolina's stated and strong public policy to support public education. *See generally* David M. Lawrence, *Fines, Penalties, and Forfeitures: An Historical and Comparative Analysis*, 65 N.C. L. Rev. 49, 54-59 (1986).

The general statutes mandate that the proceeds of penalties and other monies within the scope of Article IX, § 7 must be remitted by the collecting agency to the Office of State Management and Budget in order for the proceeds to be deposited in the State's Civil Penalty and Forfeiture Fund. N.C. Gen. Stat. §§ 115C-457.2, -457.3 (2017).

The Supreme Court of North Carolina has defined a "penalty" to be an amount collected under a "penal law[]," or a "law[] that impose[s] a monetary payment for [its] violation [where] [t]he payment is *punitive* rather than remedial in nature and is *intended to penalize the wrongdoer* rather than compensate a particular party." *Mussallam v. Mussallam*, 321 N.C. 504, 509, 364 S.E.2d 364, 366-67 (emphasis supplied), *reh'g denied*, 322 N.C. 116, 367 S.E.2d 915 (1988).

"[A]n assessment is a penalty or a fine if it is 'imposed to *deter future violations* and to *extract retribution from the violator*' for his illegal

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behavior.” *Shavitz v. City of High Point*, 177 N.C. App. 465, 475, 630 S.E.2d 4, 12 (2006) (emphasis supplied) (quoting *N.C. School Bds. Ass’n v. Moore*, 359 N.C. 474, 496, 614 S.E.2d 504, 517 (2005)).

1. Civil Penalties

Plaintiffs and NCSBA assert our Supreme Court’s holdings in *Craven County Bd. of Education v. Boyles*, 343 N.C. 87, 468 S.E.2d 50 (1996), and *Moore*, 359 N.C. 474, 614 S.E.2d 504, support their arguments that the monies paid pursuant to the Agreement are civil “penalties” and are required to be remitted to the Civil Penalty and Forfeiture Fund. The Attorney General and Intervenors argue the monies paid under the Agreement are not “penalties” because the payments were made “voluntarily” by the Companies, and were not intended to penalize the Companies for any environmental violations “or to deter future violations.” See *Shavitz*, 177 N.C. App. at 475, 630 S.E.2d at 12. We disagree.

In *Moore*, the City of Kinston had been cited for environmental violations. 359 N.C. at 507-08, 614 S.E.2d at 524. The City of Kinston entered into a settlement agreement with DEQ, under which it agreed to fund a “Supplemental Environmental Project” in lieu of paying a civil penalty. *Id.* DEQ had established Supplemental Environmental Projects as an alternative enforcement mechanism under which environmental violators would agree to fund “projects that are beneficial to the environment and/or to public health” as part of settlements to enforcement actions. *Id.* at 508, 614 S.E.2d at 525.

The Supreme Court of North Carolina considered whether the monies paid by the City of Kinston to fund a Supplemental Environmental Project were subject to Article IX, § 7 of our State Constitution. *Id.* at 507-08, 614 S.E.2d at 524. The Court concluded the monies at issue were subject to Article IX, § 7, in part because:

The payment would not have been made had [DEQ] not assessed a civil penalty against [the violator] for violating a water quality law. To suggest that the payment was voluntary is euphemistic at best. Moreover, the money paid under the [Supplemental Environmental Project] did not remediate the *specific harm* or damage caused by the violation even though a nexus may exist between the violation and the program [funded by the payment.]

Id. at 509, 614 S.E.2d at 525 (emphasis supplied).

In *Boyles*, a company had been formally assessed a civil penalty by DEQ of \$1,466,942.44. *Boyles*, 343 N.C. at 88, 468 S.E.2d at 51. The

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company sought administrative review of the penalty in the Office of Administrative Hearings. Before the matter was adjudicated, the parties settled. *Id.* The settlement required the company to pay \$926,000, but recited that the vast majority of this amount was not a penalty, but instead was made to redress harm to the environment. *Id.* at 88-89, 468 S.E.2d at 51. Despite DEQ and the company explicitly specifying the settlement amount to not be a penalty, our Supreme Court had determined the settlement payments were “covered by Article IX, Section 7.” *Id.* at 91, 468 S.E.2d at 52.

The Court based its determination primarily upon the fact the company had “entered into a settlement agreement” with DEQ “after the department found that the company had violated state environmental standards and assessed a civil penalty against” the company “for violation of those standards.” *Id.* The company had subsequently “filed for a contested [case] hearing and then settled with the department in lieu of contesting the civil penalty that had been assessed.” *Id.* The payments fell within the scope of Article IX, § 7 because they were “paid *because of a civil penalty assessed against*” the company. *Id.* (emphasis supplied).

2. Genuine Issues of Material Fact

To support their assertions that the monies the Companies agreed to pay under the Agreement before us are not penalties, the Attorney General refers to several affidavits submitted in support of his motion for summary judgment. In the affidavit of Alan Hirsch, he averred that negotiations of the Agreement were initiated in 1999 by Hirsch, the then Director of the Consumer Protection Division of the North Carolina Department of Justice under the direct authority of the Attorney General.

Hirsch and representatives of the Companies took approximately eight months to negotiate the Agreement. Attorneys from the Department of Justice’s Environmental Division were also involved throughout the negotiation process, purportedly “[t]o be certain that there was nothing in the language of the draft agreement that could be read to limit or affect in any way the compliance responsibilities of [DEQ].”

Hirsch averred “the Agreement was not reached in order to settle any cases in which a civil penalty had been issued or might later be issued[,]” and “[t]he Agreement did not arise from or address any actual or alleged violations of law or regulation on the part of Smithfield. No penalties or punitive action of any sort was ever discussed or considered. The Agreement was not, and is not, punitive.”

Regarding the Companies reasons for entering the Agreement, Hirsch stated:

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9. I believe the purpose from Smithfield's perspective was to solve a long running problem of major public concern, to demonstrate good corporate citizenship by working towards better waste management solutions, and to further its public standing by making additional enhancements of North Carolina's environment. The image of the industry was under intense scrutiny by the press, citizens and the General Assembly, all a matter of great concern to the industry.

Daniel Oakley stated in his affidavit:

21. As a primary negotiator of [the Agreement], . . . I know that the [Agreement] was not reached in order to settle any cases in which a civil penalty had been assessed by [DEQ]. As Director of the Environmental Division, I know that no civil penalty being defended by attorneys in my Division was settled, compromised, or in any way impacted by the negotiation or execution of the [Agreement].

. . .

24. Although there were Notices of Violation and Civil Penalty Assessments issued to various hog farms from 1995 to 2001, any Civil Penalty Assessments were resolved by other means and were not part of the Agreement at issue in this case.

The sworn attestations in these affidavits purport the payments the Companies undertook to pay under the Agreement are not punitive because they did not resolve any past, present, or future violations of environmental laws. Nonetheless, several factors in the record raise genuine issues of material fact regarding whether the payments were "intended to penalize" the Companies or were "imposed to deter future violations and to extract retribution from" the Companies. *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 367; *Moore*, 359 N.C. at 496, 614 S.E.2d at 517.

First, it is undisputed by the parties that the negotiating and consummating of the Agreement was instigated at the behest of and initiated by the Attorney General's office, and not by the Companies. If the Agreement was purportedly sought or undertaken by the Companies to "demonstrate good corporate citizenship" and to "improve the image" of the hog farming industry, as attested to by Alan Hirsch, and not to penalize the Companies for environmental or other legal violations or coerce the Companies' compliance with such laws, a genuine issue of

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material fact exists regarding why the impetus for the Agreement was instigated from the office of the Attorney General, the chief law enforcement officer of the State, and not from DEQ or the Companies, or why the Attorney General retains sole authority over the disbursements of the funds. *See In re Investigation by Attorney General*, 30 N.C. App. 585, 589, 227 S.E.2d 645, 648 (1976) (“The Attorney General is . . . the State’s chief law enforcement officer”).

Second, the basis, formula, and manner in which the amounts are calculated for the Companies to pay each year under the Agreement are apparently based more in penalties, or a “head tax” calculation, rather than “voluntary contributions” designed to enhance the Companies’ “good corporate citizenship,” images or goodwill, and created issues of fact. The Agreement specifically provides:

The Companies agree to pay each year for 25 years an amount equal to one dollar for each hog in which the Companies (including, for such purpose, any successor-in-interest of any of the Companies, by merger, sale of stock or assets or otherwise) have had any financial interest in North Carolina during the previous year, provided, however, that such amount shall not exceed \$2 million in any year. For purposes of this paragraph, the Companies have a financial interest in any hog that, inter alia, they (or their nonparty subsidiaries or affiliates) raise, produce, contract for, own or slaughter.

The record does not disclose the reasoning upon which the Companies agreed to pay the annual amount of \$1-per-hog for 25 years. If the Companies were purely motivated out of a desire to further their corporate image, as the Attorney General contends, it is not apparent why they would agree to pay \$1-per-hog over 25 years as opposed to a specific lump sum or stated contribution.

We note that the per-hog payments specified under the Agreement bears a resemblance to the per-cigarette payments the General Assembly enacted in the late 1990s to implement the Master Settlement Agreement with tobacco manufacturers to settle lawsuits filed by several states’ Attorneys General, including Attorney General Easley, over healthcare costs stemming from tobacco use.

In November 1998, North Carolina and forty-five other states signed a Master Settlement Agreement (MSA) with four major tobacco manufacturers for the purpose of settling claims that North Carolina could have otherwise

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asserted against those manufacturers arising from smoking-related health care costs incurred by the State as a result of the consumption of the major manufacturers' products. The General Assembly enacted a series of statutory provisions entitled the Tobacco Reserve Fund and Escrow Compliance Act (Act) in July, 1999 in order to effectuate the MSA. Pursuant to that legislation, all cigarette manufacturers doing business in North Carolina were made subject to N.C. Gen. Stat. § 66-291, which required them to choose between either (1) participating in the MSA or (2) paying certain specified sums, *computed on the basis of the quantities of cigarettes sold by April 15 of each year, into a special fund. See State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 433, 666 S.E.2d 107, 109 (2008). More specifically, N.C. Gen. Stat. § 66-291 provides that:

(a) Any tobacco product manufacturer selling cigarettes to consumers within the State (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) after the effective date of this Article shall do one of the following:

(1) Become a participating manufacturer (as that term is defined in section II(jj) of the Master Settlement Agreement) and generally perform its financial obligations under the Master Settlement Agreement; or

(2) Place into a qualified escrow fund by April 15 of the year following the year in question the following amounts (as such amounts are adjusted for inflation):

[e. For each of 2007 and each year thereafter: \$.0188482 per unit sold.]

N.C. Gen. Stat. § 66-291(a). The funds placed in escrow pursuant to N.C. Gen. Stat. § 66-291(a)(2) are intended to provide a source from which any judgment for reimbursement of medical costs obtained by the State against a nonparticipating manufacturer resulting from the consumption of cigarettes produced by that nonparticipating manufacturer can be satisfied.

State ex rel. Cooper v. Seneca-Cayuga Tobacco Co., 197 N.C. App. 176, 177-78, 676 S.E.2d 579, 581 (2009) (emphasis supplied) (citing N.C. Gen. Stat. § 66-291(a)).

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Under the MSA:

In return for the states dropping their suits against the four companies, the companies agreed to pay the states \$206 billion over twenty-five years. Thereafter, payments were to continue to be based on the quantity of cigarette sales of each company. Payment was made as compensation for the additional cost that state Medicaid programs had allegedly incurred for treatment of Medicaid recipients with smoking-related diseases and as a penalty for deceptive trade practices of the companies.

Frank Sloan & Lindsey Chepke, *Litigation, Settlement, and the Public Welfare: Lessons from the Master Settlement Agreement*, 17 Widener L. Rev. 159, 161 (2011).

Unlike the tobacco MSA, the Attorney General and Intervenors contend the Agreement with the Companies before us is not a settlement agreement, as it purportedly did not “settle” any legal claims. However, a genuine issue of material fact exists of whether the Agreement was motivated by a desire by the Companies to forestall, or forebear, any potential claims the Attorney General or DEQ could have asserted against them.

If so, an issue of fact exists of whether the Companies would not have agreed to make the payments at issue, but for potential legal claims, and consequent civil penalties or fines, the Attorney General could have asserted against them. *See Moore*, 359 N.C. at 509, 614 S.E.2d at 525 (holding, in part, that a payment made by the City of Kinston to fund environmental programs in lieu of civil penalties asserted by DEQ was a penalty subject to Article IX, § 7).

The timing of enforcement actions taken against the Companies and subsequent facts also raise genuine issues of material fact with regard to whether the payments under the Agreement were intended to be punitive, or in lieu of enforcement actions asserted against the Companies. Records before the Court of DEQ enforcement actions against the Companies presented by Plaintiffs highlight that a number of the Companies had civil penalties assessed against them in the time period preceding and following the signing of the Agreement.

In the fourteen months preceding the signing of the Agreement, DEQ assessed nine civil penalties against the Companies for environmental violations. In the eight months following the signing of the Agreement, DEQ assessed nine additional penalties against the Companies. Eight

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of these civil penalties were paid in full by the Companies, including six that were paid in full after the Agreement was signed. Seven penalties were settled for discounted amounts. Although the Companies paid many of these civil penalties after the Agreement was executed on 25 July 2000, *all* were for notices of violations accrued or issued by DEQ *before* the Agreement was executed. The record before us does not demonstrate DEQ issued *any* notices of violations to the Companies after the Agreement was signed.

This apparent discrepancy between the number of notices of violations issued to the Companies *before and after* the Agreement was signed raises genuine issues of material fact regarding whether the Attorney General, DEQ, and the Companies intended for the Agreement, and the payments specified therein, to be in lieu of further enforcement actions, and their related civil penalties, against the Companies. Whether these payments were “intended to penalize” the Companies or were “imposed . . . to deter future violations and to extract retribution from” the Companies is an issue of fact, which remains to be resolved. *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 366-67; *Moore*, 359 N.C. at 496, 614 S.E.2d at 517.

Another genuine issue of material fact, concerning whether the payments were intended to penalize the Companies, is also raised by the express terms of the Agreement. In addition to the commitment to pay up to \$50 million for environmental enhancement activities, the Companies also committed in the Agreement to implement plans to correct “deficient site conditions or operating practices” on properties and operations they owned. The Companies also committed to implement what the Agreement refers to as “Environmentally Superior Technologies.” The Agreement specifies, “[i]mplementation will include the installation and operation of monitoring equipment and procedures needed *to ensure compliance with applicable environmental standards*, in accordance with the applicable permit conditions.” (Emphasis supplied).

The question of why the Companies committed to undertake actions to remediate deficient conditions on their farms and operations, install equipment, and *additionally* pay up to \$50 million raises the issue of whether the \$50 million in additional payments was intended to penalize the Companies for non-compliance with environmental standards or to induce forbearance on the part of the Attorney General, or DEQ, in bringing future enforcement actions. This is especially pertinent in light of the Companies relinquishing *any* control over to whom and in what amounts the Attorney General distributes the environmental grants.

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Another genuine issue of material fact concerning whether these payments were intended to be penalties is raised by two official and public communications issued by the Attorney General's office in 2002 and 2013, respectively. Both of these communications expressly refer to the Agreement as a "settlement." Whether the Agreement is, in fact, a "settlement" is not ultimately determinative of whether the payments are penalties. *See Boyles*, 343 N.C. at 92, 468 S.E.2d at 53 (stating "it is not determinative that the monies were collected by virtue of a settlement agreement"). However, the Attorney General's reference to the Agreement as a "settlement" in these press releases raises a genuine issue of material fact of whether the parties intended for the Agreement, and the payments thereunder, to be in lieu of any potential claims or enforcement actions the Attorney General or DEQ could have brought against the Companies.

Based upon the genuine issues of material fact regarding whether these payments, instigated at the Attorney General's behest, were "intended to penalize" the Companies or were "imposed . . . to deter future violations and to extract retribution from" the Companies, the superior court incorrectly concluded these payments constitute civil penalties as a matter of law.

V. Conclusion

Genuine issues of material fact exist to preclude summary judgment for the parties. The record on appeal is not sufficiently developed for us to make the *de novo* determination of whether the payments undertaken by the Companies under the Agreement were, as a matter of law, "penalties" within the scope of Article IX, § 7 of our State Constitution. Whether these payments are penalties depends upon whether they were "intended to penalize" the Companies or "imposed to deter future violations and to extract retribution." *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 366-67; *Moore*, 359 N.C. at 496, 614 S.E.2d at 517.

We reverse the trial court's order, which determined that the payments are not penalties as a matter of law. We remand to the trial court for trial to determine whether the payments in the Agreement were intended to constitute penalties, payment in lieu of penalties, forbearance for potential or future enforcement actions, or were not penalties. The order of the trial court, which granted Defendant's motion for summary judgment, is reversed. This matter is remanded for trial. *It is so ordered.*

REVERSED AND REMANDED.

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Judge BERGER concurs.

Judge BRYANT dissents with separate opinion.

Bryant, Judge, dissenting.

The majority holds that genuine issues of material fact exist so as to preclude summary judgment because the “record on appeal is not sufficiently developed for us to make the determination of whether the payments undertaken by the Companies [(Smithfield Foods, Inc., and subsidiaries)] under the Agreement were ‘penalties’ within the scope of Article IX § 7 of our State Constitution.” The majority goes on to state that “[w]hether these payments are penalties depends upon whether they were ‘intended to penalize’ the Companies or ‘imposed to deter future violations and to extract retribution.’ ” Because I believe the record on appeal is sufficient to make a determination as a matter of law on the question before this Court, I respectfully dissent.

The trial court concluded as a matter of law that funds paid pursuant to the agreement between the North Carolina Attorney General and the Companies were not subject to Article IX of the North Carolina Constitution and should not be remitted to the Civil Penalty and Forfeiture Fund. The question before this Court is whether the trial court erred in reaching this conclusion. I submit the trial court did not err.

I disagree with the majority’s determination that there are genuine issues of material fact—a determination that is not otherwise supported herein. The record is replete with affidavits and submissions on the very matters for which the majority would have the trial court hold another hearing. In the summary judgment hearing before the trial court and in the arguments made before this Court, there was no argument that the case was not ripe for summary judgment or that genuine issues of material fact were yet to be decided. In fact, plaintiff-appellant states:

The question before the trial court was a matter of law—whether the Smithfield Agreement constituted a settlement agreement such that the Section III.D payments must be remitted to the Civil Penalty and Forfeiture Fund. . . . ONLY A QUESTION OF LAW REMAINS . . . Plaintiffs have consistently maintained this case is one “where only a question of law on the indisputable facts is in controversy.”

(citation omitted). Plaintiffs then go on to outline what they consider to be the relevant, indisputable facts, none of which are in controversy.

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They, and all parties, acknowledge the only matter in controversy is the legal issue that has been appealed to this Court.

By determining that material issues of fact exist and that the matter should be remanded to the trial court, this Court has created an argument none of the parties anticipated. *See Viar v. N. Carolina Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (“It is not the role of the appellate courts, however, to create an appeal for a[] [party]. As this case illustrates, the Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an [opposing party] is left without notice of the basis upon which an appellate court might rule.” (citation omitted)).

Therefore, based on the voluminous evidence before this Court, I would reach the main legal issue before us—which is the same issue that was before the trial court—hold that the trial court properly applied the law to the undisputed material facts of this case, and affirm the judgment of the trial court.

FRANCISCO FAGUNDES AND DESIREE FAGUNDES, PLAINTIFFS
v.
AMMONS DEVELOPMENT GROUP, INC.; EAST COAST DRILLING & BLASTING, INC.;
SCOTT CARLE; AND JUAN ALBINO, DEFENDANTS

No. COA17-1427

Filed 4 September 2018

Construction Claims—blasting—ultrahazardous activity—strict liability—independent contractor

A heavy equipment operator (plaintiff) who was injured by flying rock blasted in a construction site sufficiently alleged a strict liability claim against defendant development company—for whom plaintiff’s employer was an independent contractor—to survive a 12(b)(6) motion to dismiss. The limited caselaw on the issue suggested that strict liability may attach to any party “responsible for” blasting, because it is an ultrahazardous activity.

Judge MURPHY concurring in result only.

Appeal by Plaintiff from order entered 9 October 2017 by Judge A. Graham Shirley, II in Superior Court, Wake County. Heard in the Court of Appeals 4 June 2018.

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The Jernigan Law Firm, by Leonard T. Jernigan, Jr. and Anthony L. Lucas, for Plaintiff-Appellant Francisco Fagundes.

Ragsdale Liggett PLLC, by Amie C. Sivon and John M. Nunnally, for Defendant-Appellee Ammons Development Group, Inc.

McGEE, Chief Judge.

Francisco Fagundes (“Plaintiff”) appeals an order entered 9 October 2017 granting summary judgment in favor of defendant East Coast Drilling & Blasting, Inc., defendant Scott Carle, and defendant Juan Albino (collectively, “the other defendants”). Plaintiff appeals the 9 October 2017 order for the sole purpose of appealing an order entered 8 December 2015 granting a motion to dismiss in favor of defendant Ammons Development Group, Inc. (“Defendant”). Plaintiff has no outstanding claims against the other defendants.¹ For the reasons discussed below, we reverse the trial court’s 8 December 2015 order.

I. Factual and Procedural Background

Defendant was the developer of Heritage East (“Heritage East” or “the construction site”), a planned residential subdivision in Wake Forest, North Carolina. Defendant hired East Coast Drilling & Blasting, Inc., (“East Coast”) to provide the services of onsite drilling, blasting, and crushing of rock during the construction of Heritage East. Plaintiff was employed by East Coast as a heavy equipment operator in East Coast’s rock crushing division.

Members of East Coast’s blasting crew were blasting a certain area within the construction site on or about 25 June 2013. Plaintiff was also working at the construction site that day. According to both Plaintiff and Defendant, Juan Albino (“Albino”), a blaster employed by East Coast, misinformed Plaintiff that Plaintiff was “located in a position that would be safe from flying debris and flyrock [that would be dislodged as a result of an imminent blast].” When Albino subsequently conducted the blast, flyrock and debris flew from the blast site with tremendous force. A heavy piece of rock struck Plaintiff’s left leg, causing injuries.

Plaintiff filed a complaint against Defendant, East Coast, Albino, and Scott Carle, an East Coast executive officer, on 29 January 2015. In addition to various claims asserted against the other defendants, Plaintiff

1. Plaintiff Desiree Fagundes filed a voluntary dismissal in this action on 13 October 2015.

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alleged Defendant was “strictly liable for the damages sustained by Plaintiff . . . that were proximately caused by the ultrahazardous activity of blasting.” Defendant filed an answer and motion to dismiss Plaintiff’s complaint on 20 April 2015. Citing N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), Defendant first asserted that Plaintiff failed to state a valid claim for relief. Among its additional defenses, Defendant further asserted that “[t]he doctrine of strict liability . . . does not apply to cases where injury results to those who have reason to know of the risk which makes the undertaking ultrahazardous and bring themselves within the area which will be endangered by its miscarriage.” Defendant alleged that

[a]s an employee working in the field of blasting, Plaintiff [] consented to the dangers and risks associated with the field of blasting and cannot recover against Defendant [] on a claim of strict liability. Plaintiff[] knowingly put himself at risk and was an active participant. Further, Plaintiff[] was warned about the risks associated with blasting and was trained regarding the risks associated with blasting.

The trial court granted Defendant’s motion to dismiss on 8 December 2015. Plaintiff appealed the dismissal of his strict liability claim against Defendant, but this Court dismissed that appeal as interlocutory because Plaintiff “continue[d] to assert unadjudicated claims against [the other] defendants[,]” and Plaintiff did not specifically contend the interlocutory appeal affected a substantial right that would be lost absent immediate review. *See Fagundes v. Ammons Development Group, Inc.*, ___ N.C. App. ___, ___, 791 S.E.2d 876, ___ (2016) (unpublished).

The trial court subsequently denied summary judgment on Plaintiff’s strict liability claim against the other defendants and Plaintiff’s willful, wanton, and reckless negligence claim against Albino. On appeal, this Court reversed. *See Fagundes v. Ammons Development Group, Inc.*, ___ N.C. App. ___, 796 S.E.2d 529 (2017) (“*Fagundes I*”). We concluded that “because [Plaintiff] was injured in a work-related accident, the [North Carolina] Workers’ Compensation Act provide[d] the exclusive remedy for his injuries, and the trial court lacked jurisdiction to adjudicate his strict liability claims against his employer.” *Id.* at ___, 796 S.E.2d at 533. This Court also concluded the trial court erroneously denied summary judgment with respect to Plaintiff’s claim against Albino for willful, wanton, and reckless negligence. *Id.* at ___, 796 S.E.2d at 533. On remand, the trial court entered an order on 9 October 2017 granting summary judgment for the other defendants on Plaintiff’s strict liability claim, and granting summary judgment for Albino on Plaintiff’s claim for willful, wanton, and reckless negligence. Consequently, Plaintiff concedes

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the other defendants “are no longer aggrieved parties.” Plaintiff now appeals from the 9 October 2017 order for the purpose of appealing the 8 December 2015 order dismissing Plaintiff’s strict liability claim against Defendant.

II. Motion to DismissA. *Standard of Review*

A motion to dismiss under [N.C. Gen. Stat. § 1A-1, Rule] 12(b)(6) is the usual and proper method of testing the legal sufficiency of [a] complaint. In reviewing a trial court’s Rule 12(b)(6) dismissal, the appellate court must inquire whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.

Newberne v. Department of Crime Control & Pub. Safety, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (citations and internal quotation marks omitted). “A complaint may be dismissed pursuant to Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim.” *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010) (citation and quotation marks omitted). “The complaint must be liberally construed, and [a] court should not dismiss the complaint unless it appears *beyond a doubt* that the plaintiff could not prove *any* set of facts to support his claim which would entitle him to relief.” *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 480, 593 S.E.2d 595, 598 (2004) (citation and quotation marks omitted) (emphases added). *See also Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428 (2007) (“The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when . . . all the allegations included therein are taken as true.” (citation omitted) (emphasis added)); *Acosta v. Byrum*, 180 N.C. App. 562, 567, 638 S.E.2d 246, 250 (2006) (“When analyzing a 12(b)(6) motion, the court . . . is concerned with the law of the claim, not the accuracy of the facts that support [the] [] motion.” (citation omitted)). “This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court’s ruling on the motion to dismiss was correct.” *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

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B. Analysis

A Rule 12(b)(6) motion to dismiss “is addressed to whether the facts alleged in the complaint, when viewed in the light most favorable to the plaintiff[], give rise to a claim for relief on any theory.” *Ford v. Peaches Entertainment Corp.*, 83 N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986) (citation omitted). Importantly, “[t]he issue is not whether a plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claim.” *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 607, 659 S.E.2d 442, 448 (2008).

In the present case, Plaintiff’s complaint alleged the following in support of his strict liability claim against Defendant:

58. Blasting is an ultrahazardous activity.

59. Defendant [] knew that blasting is an ultrahazardous activity.

60. Defendant [] hired [d]efendant East Coast to perform the ultrahazardous activity of blasting at the Heritage East development site, including the area in question.

61. In hiring [d]efendant East Coast to perform the ultrahazardous activity of blasting, Defendant [] ha[d] a non-delegable duty for the safety of Plaintiff [].

62. Defendant [] is strictly liable for the damages sustained by Plaintiff [] that were proximately caused by the ultrahazardous activity of blasting.

63. As a direct and proximate result of the ultrahazardous activity of blasting by Defendant [] as described herein, Plaintiff [] suffered the injuries and sustained the damages set forth above, and is entitled to compensatory damages[.]

In a memorandum of law filed by Defendant in support of its motion to dismiss, Defendant contended Plaintiff’s complaint “disclosed facts which necessarily defeat Plaintiff’s claim against [Defendant].” Defendant argued certain facts alleged in the complaint made it “clear that Plaintiff *assumed the risk of being injured by a blast* and as such Plaintiff has not stated a claim for which relief can be granted.” (emphasis added). Defendant argued that Plaintiff “voluntarily exposed himself to danger both generally (by accepting employment with a blasting company[]) and specifically (by being at the blast [that occurred on [25 June] 2013[]).”

On appeal, Defendant asserts that an employee of a blasting company has no legally cognizable strict liability claim – against *any* third

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party – for blasting-related injuries sustained while at work. According to Defendant, in this context, “assumption of risk” is implicit in the contract of employment and bars recovery on the basis of strict liability as a matter of law. Thus, Defendant submits that, in the present case, “Plaintiff, an employee of a blasting company, has no recognized strict liability claim against the developer [] which hired [Plaintiff’s] [employer].” Defendant further argues that, even if Plaintiff is entitled to assert a strict liability claim in this context, the affirmative defense of assumption of risk applies to Plaintiff’s claim and, based on the allegations in Plaintiff’s complaint, bars recovery as a matter of law. We disagree.

Ordinarily, “one who employs an independent contractor is not liable for the independent contractor’s acts.” *Reynoso v. Mallard Oil Co.*, 223 N.C. App. 58, 61, 732 S.E.2d 609, 611 (2012) (citation omitted). “However, if the work to be performed by [an] independent contractor is either (1) ultrahazardous or (2) inherently dangerous, and the employer either knows or should have known that the work is of that type, liability *may* attach despite the independent contractor status.” *Kinsey v. Spann*, 139 N.C. App. 370, 374, 533 S.E.2d 487, 491 (2000) (emphasis added).

“Blasting is ultrahazardous because high explosives are used and it is impossible to predict with certainty the extent or severity of its consequences.” *Guilford Insurance Co. v. Blythe Brothers Co.*, 260 N.C. 69, 74, 131 S.E.2d 900, 904 (1963) (citation and quotation marks omitted). In *Guilford*, our Supreme Court held that, as a result of the unpredictable and unpreventable dangers associated with blasting, “[b]lasting operations . . . must pay their own way. . . . The principle of strict or absolute liability for extrahazardous [sic] activity thus is the only sound rationalization.” *Id.* (citation and quotation marks omitted). The Court subsequently described strict liability for blasting as

[t]he rule . . . that one who is lawfully engaged in blasting operations is liable *without regard to whether he has been negligent*, if by reason of the blasting he causes direct injury to neighboring property or premises by casting rocks or debris thereon or by concussion or vibrations set in motion by the blasting.

Trull v. Well Co., 264 N.C. 687, 691, 142 S.E.2d 622, 624 (1965) (emphasis added). “To date, blasting is the only activity recognized in North Carolina as ultrahazardous. Consequently, those responsible are held strictly liable for damages, mainly because the risk of serious harm cannot be eliminated with reasonable care.” *Jones v. Willamette Industries, Inc.*, 120 N.C. App. 591, 596, 463 S.E.2d 294, 298 (1995) (citation omitted).

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Our appellate courts have distinguished between ultrahazardous activities, which give rise to strict liability, and “inherently dangerous activities,” which are governed by principles of negligence. “Unlike ultrahazardous activities, inherently dangerous activities are susceptible to effective risk control through the use of adequate safety precautions.” *Woodson v. Rowland*, 329 N.C. 330, 351, 407 S.E.2d 222, 234 (1991) (citation omitted). “[T]aking the necessary safety precautions can demonstrate reasonable care protecting the responsible party from liability under a negligence standard.” *Id.* This Court stated in *Kinsey* that, in contrast to inherently dangerous activity claims, in cases involving ultrahazardous activities, “the employer is *strictly* liable for any harm that proximately results [from the ultrahazardous activity]. In other words, he is liable even if due care was exercised in the performance of the activity.” *Kinsey*, 139 N.C. App. at 374, 533 S.E.2d at 491 (citations omitted) (emphasis in original).

Generally, the [North Carolina] Workers’ Compensation Act provides the exclusive remedy for an employee injured in a workplace accident. However, in *Woodson*, [] our Supreme Court created an exception allowing an employee to assert a [civil] claim against an employer for damages when the employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees[.]

Arroyo v. Scottie’s Professional Window Cleaning, 120 N.C. App. 154, 158-59, 461 S.E.2d 13, 16 (1995) (citations and internal quotation marks omitted); *see also Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 239-40, 424 S.E.2d 391, 395 (1993). The “*Woodson* exception” applies not only to an employee’s direct employer but also to “[o]ne who employs an independent contractor to perform an inherently dangerous activity[,] [and the principal hiring entity] may not delegate to the independent contractor the duty to provide for the safety of others[.]” *Woodson*, 329 N.C. at 352, 407 S.E.2d at 235. “The party that employs the independent contractor has a continuing responsibility to ensure that adequate safety precautions are taken.” *Id.* Accordingly, under *Woodson*, a party that hires an independent contractor to perform an inherently dangerous activity, and “[knows] of the circumstances creating the danger,” is liable to employees of the independent contractor if the principal employer fails to “exercise due care to see that [the employees] [are] provided a safe place in which to work and proper safeguards against any dangers as might be incident to the work.” *Id.* at 356-57, 407 S.E.2d at 238.

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We note that *Woodson* involved an employee who was killed while constructing a trench, an activity that may or may not be deemed *inherently dangerous* depending “on the particular trench being dug and the pertinent circumstances surrounding the digging.” *Id.* at 356, 407 S.E.2d at 237; *see also O’Carroll v. Texasgulf, Inc.*, 132 N.C. App. 307, 313, 511 S.E.2d 313, 318 (1999) (“Although the determination of whether an activity is inherently dangerous is often a question of law, whether a particular *trenching* situation constitutes an inherently dangerous activity *usually* presents a question of fact and should be addressed on a case by case basis[.]” (citations omitted) (emphases in original)). Although *Woodson* involved an inherently dangerous activity claim, our Supreme Court stated in its opinion that

[p]arties whose blasting proximately causes injury are held strictly liable for damages, largely because reasonable care cannot eliminate the risk of serious harm. Because these activities are extremely dangerous, they must “pay their own way,” and the parties who are responsible must bear the cost regardless of whether they have been negligent.

Id. at 350-51, 407 S.E.2d at 234 (citations omitted). In the present case, Plaintiff contends this language in *Woodson* supports his strict liability claim against Defendant. *See also id.* at 352, 407 S.E.2d at 235 (“The rule imposing liability on one who employs an independent contractor [to perform an inherently dangerous activity] applies whether [the activity] involves an appreciable and foreseeable danger *to the workers employed* or to the public generally.” (citation and internal quotation marks omitted) (second alteration in original) (emphasis added)). Defendant responds that *Woodson* “did not address whether the employees of independent contractors [are] included within the protection of strict liability claims” or “whether a strict liability claim can be brought by an employee of a company engaged in ultrahazardous activities against the entity who hired the company.” Defendant observes that “[n]o North Carolina court has found that [a] hiring entity is strictly liable for an injury to an employee of the company who conducted an ultrahazardous activity.” We observe, however, that Defendant also has not cited any North Carolina case law concluding a hiring entity *cannot*, as a matter of law, be strictly liable to employees of its independent contractor for blasting-related injuries.

In cases predating the North Carolina Workers’ Compensation Act (“WCA”), *see* N.C. Gen. Stat. § 97-1 *et seq.*, our Supreme Court repeatedly

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held that parties responsible for blasting operations could not avoid liability for harms associated with blasting merely by employing an independent contractor to do the work. *See Watson v. R.R.*, 164 N.C. 176, 182, 80 S.E. 175, 177 (1913); *Arthur v. Henry*, 157 N.C. 393, 402, 73 S.E.2d 206, 209-10 (1911); *Hunter v. R.R.*, 152 N.C. 682, 687-89, 68 S.E. 237, 239-40 (1910). With respect to *employees* of an independent contractor, our Supreme Court stated in *Greer v. Construction Co.*, 190 N.C. 632, 130 S.E. 739 (1925):

The rule exempting an owner or contractor from liability for the negligence of an independent contractor to a stranger or third person does not necessarily exempt such owner or contractor from liability to the servant or employee of the independent contractor who is injured while engaged in work for the ultimate benefit of such owner or contractor. There is a relationship between the owner or contractor and the servant or employee of the independent contractor which may impose upon the former duties which the law does not impose upon him with respect to strangers or third persons. The law would not be just to itself or to those who have a right to rely upon it for protection, if an owner or contractor could, in all cases, by committing the work in which he is interested to an independent contractor, secure absolute exemption from all liability to those who by their labor and by methods and under circumstances contemplated when the original contract was made, contribute to its full performance.

Greer, 190 N.C. at 636, 130 S.E. at 742. Recognizing that “certain exceptions must be made to the general rule exempting owners or contractors from liability for the negligence of an independent contractor[,]” the Court further observed that

[w]here the thing contracted to be done is necessarily attended with danger, however skillfully and carefully performed, or is intrinsically dangerous, it is held that the party who lets the contract to do the act cannot thereby escape responsibility for any injury resulting from its execution, although the act to be performed may be lawful.

Id. (citation and quotation marks omitted).

Defendant dismisses *Hunter*, *Arthur*, *Watson*, and *Greer* as “inapplicable” to the present case because they preceded both the WCA and the

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adoption of strict liability for blasting in *Guilford*. Regardless, we find these cases useful for their discussions about the relationship between the employer of an independent contractor and third parties, *including* employees of the independent contractor, when the work of the independent contractor is “necessarily attended with danger, however skillfully and carefully performed[.]” *Greer*, 190 N.C. at 636, 130 S.E. at 742; *see also Watson*, 164 N.C. at 182, 80 S.E. at 177 (“[T]he doctrine is well established and is applicable here that the work at which the plaintiff [employee] was engaged[, blasting,] is so intrinsically dangerous that protection from liability will not be afforded by an independent contract[.]”); *Arthur*, 157 N.C. at 402, 73 S.E.2d at 210 (“[W]e must hold that the work to be done[, blasting,] was of such character that the defendant [quarry owner] could not protect himself by the lease he made, and that he is liable for the acts of the [independent contractor] in the prosecution of the work.”).

Since *Guilford* – which did not involve personal injury or an employment-related claim – few cases in our State have applied the principle of strict liability for blasting. References to strict liability for blasting most often appear in *dicta* in cases involving inherently dangerous activity claims. In mentioning strict liability for blasting, however, our appellate courts have consistently indicated that a party “responsible for,” or “engaged in,” the ultrahazardous activity is strictly liable for harm caused by the blasting. *See, e.g., Woodson*, 329 N.C. at 350-51, 407 S.E.2d at 234 (“Parties whose blasting proximately causes injury are held strictly liable for damages, largely because reasonable care cannot eliminate the risk of serious harm. Because these activities are extremely dangerous, they must ‘pay their own way,’ and *the parties who are responsible* must bear the cost regardless of whether they have been negligent.” (citations omitted) (emphasis added)); *Trull*, 264 N.C. at 691, 142 S.E.2d at 624 (“The rule . . . is that *one who is lawfully engaged in* blasting operations is liable without regard to whether he has been negligent, if by reason of the blasting he causes direct injury to neighboring property or premises[.]” (emphasis added)); *Jones*, 120 N.C. App. at 596, 463 S.E.2d at 298 (“To date, blasting is the only activity recognized in North Carolina as ultrahazardous. Consequently, *those responsible* are held strictly liable for damages, mainly because the risk of serious harm cannot be eliminated with reasonable care.” (emphasis added)). Our Supreme Court stated in *Trull* that “the rule of liability without allegation and proof of negligence . . . casts the risk of the venture [of blasting] on *the person who introduces the peril in the community*.” *Trull*, 264 N.C. at 691, 142 S.E.2d at 624 (emphasis added). Our limited precedent on strict liability for blasting thus suggests that strict liability may attach to any person or

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entity found “responsible for” blasting, and our pre-WCA case law suggests that parties “responsible for” blasting may include one that hires an independent contractor to conduct blasting operations.

Our case law also requires an element of proximate causation between the blasting operations at issue and the injury or damages alleged. *See, e.g., Trull*, 264 N.C. at 691, 142 S.E.2d at 624 (holding “that one who is lawfully engaged in blasting operations is [strictly] liable . . . if by reason of the blasting he *causes direct injury*[.]” (emphasis added)); *Kinsey*, 139 N.C. App. at 374, 533 S.E.2d at 491 (noting an employer engaged in blasting “is *strictly* liable for any harm that *proximately results*.” (citation omitted) (second emphasis added)); *Cody v. Dept. of Transportation*, 45 N.C. App. 471, 474, 263 S.E.2d 334, 335-36 (1980) (“Because of the inherently dangerous or ultrahazardous nature of blasting, when a contractor employed by the Department of Transportation uses explosives in the performance of his work, he is primarily and strictly liable for any damages *proximately resulting therefrom*.” (citation and internal quotation marks omitted) (emphasis added)).

Here, Plaintiff’s complaint specifically alleged that Defendant “*hired [] East Coast to perform the ultrahazardous activity of blasting at the Heritage East development site, including the area in [which Plaintiff was injured].*” (emphasis added). Plaintiff’s complaint also alleged that “[a]s a direct and proximate result of the ultrahazardous activity of blasting by Defendant . . . , Plaintiff . . . suffered the injuries and sustained the damages set forth [in the complaint][.]” (emphasis added). We conclude that, under existing North Carolina law, Plaintiff has “allege[d] the substantive elements of a valid claim[.]” for strict liability for blasting. *See Acosta*, 180 N.C. App. at 566-67, 638 S.E.2d at 250. Whether Plaintiff can successfully prove Defendant was or should be considered “responsible for” the blast that injured Plaintiff remains to be determined, but for purposes of Rule 12(b)(6), we find it sufficient that Plaintiff alleged Defendant directly solicited East Coast’s blasting services, and that a blast conducted pursuant to Defendant’s contract with East Coast proximately caused Plaintiff’s injuries.

Recently, in a separate appeal by the other defendants in this matter, this Court determined that the WCA provides the exclusive remedy for an employee of a blasting company who is injured by blasting and seeks to recover against his employer, *i.e.*, the blasting company. *See Fagundes I*, ___ N.C. App. at ___, 796 S.E.2d at 532-33; *see also Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003) (“As this Court has often discussed, the [WCA] was created to ensure that injured employees receive sure and certain recovery for their

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work-related injuries without having to prove negligence on the part of the employer or defend against charges of contributory negligence. In exchange for these limited but assured benefits, the employee is generally barred from suing the employer for potentially larger damages in civil negligence actions and is instead limited exclusively to those remedies set forth in the [WCA].” (citations and internal quotation marks omitted)). After observing in *Fagundes I* that “the workers’ compensation system [itself] imposes strict liability on employers[,]” this Court expressly declined to “create a new exception to the [WCA] because of the high risk of serious injury in these types of ultrahazardous jobs and the robust common law remedies that were available to workers injured in these types of jobs before our General Assembly created the workers’ compensation system.” *Fagundes I*, ___ N.C. App. at ___, 796 S.E.2d at 533. We concluded that, notwithstanding the ultrahazardous nature of blasting, “because [Plaintiff] was injured in a work-related accident, the [WCA] provide[d] the exclusive remedy for his injuries, and the trial court lacked jurisdiction to adjudicate his strict-liability claims *against his employer*.” *Id.* at ___, 796 S.E.2d at 533 (emphasis added). In the present case, Defendant urges us to “reject Plaintiff’s additional attempt to expand strict liability” by recognizing a strict liability claim against an entity that hires an independent contractor to provide blasting services by an employee of the independent contractor injured by blasting.

Fagundes I involved Plaintiff’s strict liability claim against his direct employer and co-employee only. See *Estate of Gary Vaughn v. Pike Electric, LLC*, 230 N.C. App. 485, 494, 751 S.E.2d 227, 233 (2013) (“Under the [WCA’s] exclusivity provision, a worker is generally barred from bringing an action in our courts of general jurisdiction *against either his employer or a co-employee*. Instead, the worker must pursue his or her action before the North Carolina Industrial Commission.” (internal citation omitted) (emphasis added)). This Court explicitly characterized the issue on appeal in *Fagundes I* as being “whether employees injured while working in ‘ultrahazardous’ jobs may sue *their employers* in the court system despite the provisions of the [WCA] requiring those claims to be pursued [before] the Industrial Commission.” *Id.* at ___, 796 S.E.2d at 531 (emphasis added). While this Court suggested our analysis in *Fagundes I* encompassed employee claims “stemming from workplace injuries[,]” we also acknowledged language in *Woodson* that “discussed how a general contractor could be held strictly liable for injuries caused by a subcontractor engaged in an ultrahazardous activity, such as blasting.” *Id.* at ___, 796 S.E.2d at 532 (citation omitted). In requiring Plaintiff to bring his claims against East Coast before the Industrial Commission, we stressed that “the workers’ compensation

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system [already] imposes strict liability *on employers*.” *Id.* at ____, 796 S.E.2d at 533 (emphasis added).

“To be entitled to maintain a proceeding for workers’ compensation, the claimant must be, in fact and in law, *an employee of the party from whom compensation is claimed*.” *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 383, 364 S.E.2d 433, 437 (1988) (citations omitted) (emphasis added). “It is well established that in order for a claimant to recover under the Workers’ Compensation Act, the employer-employee relationship must exist at the time of the claimant’s injury.” *Ramey v. Sherwin-Williams Co.*, 92 N.C. App. 341, 343, 374 S.E.2d 472, 473 (1988); *see also* *Hughart v. Dasco Transp., Inc.*, 167 N.C. App. 685, 689, 606 S.E.2d 379, 382 (2005) (“The claimant has the burden of proving that an employer-employee relationship existed at the time that the injury by accident occurred.” (citation omitted)). “The question as to whether an employer-employee relationship existed at the time of injury is a question of jurisdictional fact . . . [that] is reviewable by this Court on appeal.” *Durham v. McLamb*, 59 N.C. App. 165, 168, 296 S.E.2d 3, 5 (1982) (noting that, on appeal, “it is incumbent on this Court to review and consider *all of the evidence of record* and make an independent finding [as to the existence of an employer-employee relationship].” (citations omitted) (emphasis added)); *see also* *Postell v. B&D Const. Co.*, 105 N.C. App. 1, 10, 411 S.E.2d 413, 418 (1992) (listing “several factors that are indicative of an employee/employer relationship.”). “[T]he Industrial Commission has no jurisdiction to apply the [WCA] to a person who is not subject to its provisions.” *Youngblood*, 321 N.C. at 383, 364 S.E.2d at 437; *see also* *Spencer v. Johnson & Johnson Seafood*, 99 N.C. App. 510, 516, 393 S.E.2d 291, 294 (1990) (concluding that, because plaintiff was not an employee of defendant, Industrial Commission “was without jurisdiction to render an award under the [WCA].”).

In the present case, nothing in Plaintiff’s complaint suggests Plaintiff and Defendant had an employer-employee relationship at the time of Plaintiff’s blasting-related injuries. *See McCraw v. Mills, Inc.*, 233 N.C. 524, 530, 64 S.E.2d 658, 662 (1951) (holding employee of independent contractor was not an employee of party that hired the independent contractor). Assuming *arguendo* that (1) Defendant *may* be subject to strict liability for Plaintiff’s injuries *if* Defendant was “responsible for” its contractor’s blasting operations, and (2) no employer-employee relationship existed between Plaintiff and Defendant when Plaintiff was injured, Plaintiff’s only avenue for pursuing a strict liability claim against Defendant would be a civil action. As discussed above, it remains to be determined whether Defendant was “responsible for”

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the blast that injured Plaintiff. Moreover, Plaintiff's complaint does not show on its face that an employer-employee relationship existed between Plaintiff and Defendant. We therefore find it premature to determine whether this Court's reasoning in *Fagundes I* regarding the WCA's exclusivity provisions necessarily defeats Plaintiff's strict liability claim against Defendant.²

Defendant offers various arguments why "[t]his Court *should* find[,] like courts in other states, and as laid out in American Jurisprudence, that employees of a blasting company cannot bring a strict liability claim against the entity who hired their company to do the work." (emphasis added). Defendant argues Plaintiff, as an employee of a blasting company, does not "fall within the scope of persons designed to be protected by strict liability." Citing case law from other jurisdictions, Defendant contends "no employee of a blasting company, *no matter his position*, should be entitled to bring a strict liability claim against a developer when the employee is at a blasting site in the course and scope of employment and injured by a blast caused by his employer." (emphasis added). According to Defendant, the mere fact that Plaintiff worked for a blasting company shows Plaintiff knew or should have known of the risks of blasting. Defendant also characterizes Plaintiff as a "participant" in the 25 June 2013 blast, rather than an "innocent bystander[[]]," because, *inter alia*, "[Plaintiff's] work in the rock crushing division involved him being on site when blasting occurred" and "[Plaintiff] was in the course and scope of his employment when the [25 June 2013] blast occurred." Defendant speculates that "employees involved in ultrahazardous activities directly benefit from the dangerous work performed

2. We also note that the defendants in *Fagundes I* appealed the denial of their motions for summary judgment, not an order granting or denying a motion to dismiss.

The distinction between a Rule 12(b)(6) motion to dismiss and a motion for summary judgment is more than a mere technicality. When considering a 12(b)(6) motion to dismiss, the trial court need only look to *the face of the complaint* to determine whether it reveals an insurmountable bar to [the] plaintiff's recovery. By contrast, when considering a summary judgment motion, the trial court must look at more than the pleadings; it must also consider additional matters such as affidavits, depositions and other specified matter outside the pleadings. Summary judgment is proper only when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law.

Locus v. Fayetteville State University, 102 N.C. App. 522, 527, 402 S.E.2d 862, 866 (1991) (citations omitted) (emphasis in original). "[T]he Rule 12(b)(6) motion is addressed solely to the sufficiency of the complaint and *does not prevent summary judgment from subsequently being granted based on material outside the complaint.*" *Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 263, 257 S.E.2d 50, 53-54 (1979) (emphasis added).

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by their company and presumably their compensation reflects the danger of the work.” Defendant further submits it should not be liable to employees of its independent contractor because “[a] developer has a different role in a project than a[] [land]owner or a general contractor.”

Whatever the factual accuracy of Defendant’s contentions, we find them inappropriate bases for dismissing Plaintiff’s complaint pursuant to Rule 12(b)(6). We are not persuaded that the mere fact of Plaintiff’s employment by East Coast, or Plaintiff’s mere presence “on site” at the time of the blast that injured him, demonstrate “*to a certainty* that [] [P]laintiff is entitled to no relief under any state [sic] of facts which could be proved in support of [his] claim.” *See Ferguson v. Williams*, 92 N.C. App. 336, 339, 374 S.E.2d 438, 439 (1988) (emphasis added). Even assuming that an employee whose job *involves blasting* cannot bring a strict liability claim for employment-related blasting injuries, Plaintiff’s complaint does not establish as a matter of law that his job with East Coast involved blasting or that, as Defendant contends, Plaintiff was not an “innocent party” under the circumstances surrounding his injuries.

Plaintiff’s complaint does not establish on its face that Plaintiff, who did not work in East Coast’s blasting division, was “involved,” “engaged,” or “a participant” in the ultrahazardous activity of blasting. Plaintiff alleged he was employed at all relevant times as a heavy equipment operator in East Coast’s rock crushing division, and, on the date of the blast that caused his injuries, he “was working in the course and scope of his employment *as a heavy equipment operator in the rock crushing division of [] East Coast.*” (emphasis added). According to Plaintiff’s complaint, the Heritage East development comprised approximately 2,000 acres of land, and “substantial portions . . . were under construction at all times relevant[.]” The complaint does not indicate where, within the larger construction site, Plaintiff typically worked; how long, prior to 25 June 2013, he was employed by East Coast; or whether and to what extent Plaintiff’s job in the rock crushing division required him to work with blasters or around blasting. The complaint alleged that, immediately before the 25 June 2013 blast, East Coast’s blaster-in-charge “misinformed Plaintiff . . . that Plaintiff . . . was located in a position that would be safe from flying debris and flyrock.” We are unable to determine whether Plaintiff knew, or should have known, he was at risk of serious injury despite being (as he believed) “outside the blasting area.” Additionally, because Plaintiff’s complaint reveals no information about Plaintiff’s salary or other employment benefits, we are unable to determine at this stage whether, as Defendant suggests, Plaintiff’s compensation may have reflected the ultrahazardous nature of blasting. *See*

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Klingstubbins SE., Inc. v. 301 Hillsborough St. Partners, LLC, 218 N.C. App. 256, 262, 721 S.E.2d 749, 753 (2012) (noting “questions of . . . material facts [] cannot be resolved under Rule 12(b)(6).”).

Given our limited case law on strict liability for blasting, we cannot conclude as a matter of law that Plaintiff falls outside “the scope of persons designed to be protected by strict liability[]” in this context. This Court’s holding in *Boston v. Webb*, 73 N.C. App. 457, 326 S.E.2d 104 (1985), is instructive. In *Boston*, the plaintiff sued a city official for issuing a press release containing allegedly defamatory information about the plaintiff. The defendant successfully moved to dismiss the plaintiff’s complaint under Rule 12(b)(6) on the basis that the plaintiff’s complaint showed the defendant was acting within the scope of his authority as a public official when he issued the press release, and that the official’s communications were therefore absolutely privileged. This Court reversed, finding it was

too early in the plaintiff’s action for us to say to a certainty that the plaintiff is entitled to no relief under any set of facts he might prove in support of his claim. We are unable to determine at this point whether [the defendant] was acting within the scope of his authority as [c]ity [m]anager when he published [the] news release. Similarly, from only the facts as found in the complaint, we cannot say whether all of the matter contained in the news release was privileged. . . . [Further], the defense of privilege is based upon the premise that some information, although defamatory, is of sufficient public or social interest to entitle the individual disseminating the information to protection against an action for liable. Whether such communications will be protected generally has been determined by the amount of public interest in the matter communicated.

Boston, 73 N.C. App. at 460-61, 326 S.E.2d at 106. This Court concluded the defendant’s motion to dismiss was improperly granted “precisely because the public’s interest in the matter and [the defendant’s] right to relay it as he did remain[ed] to be determined.” *Id.* at 461, 326 S.E.2d at 106. In the present case, we similarly find it too soon to determine whether the totality of the circumstances surrounding Plaintiff’s injuries removed him from the ambit of strict liability protection that generally applies to third parties injured by blasting.

Defendant argues in the alternative that the defense of assumption of risk should apply to strict liability claims for ultrahazardous activities

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and, in this case, requires dismissal of Plaintiff's complaint. *See Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 270, 333 S.E.2d 236, 238 (1985) ("When [a] complaint states a valid claim but also discloses an unconditional affirmative defense which defeats the asserted claim, [] the [12(b)(6)] motion will be granted and the action dismissed." (citation omitted)). As Defendant acknowledges, "[n]o North Carolina cases directly address the point of how assumption of the risk relates to a claim based on [a] defendant's strict liability for damages arising from an ultra[]hazardous activity." *Vecellio & Grogan, Inc. v. Piedmont Drilling & Blasting, Inc.*, 183 N.C. App. 66, 70, 644 S.E.2d 16, 19 (2007) (declining to address availability of assumption of risk defense for strict liability claims arising from ultrahazardous activities, where it was unclear "whether the evidence presented at trial on remand [would] even present a factual issue of assumption of risk[.]").

"The two elements of the common law defense of assumption of risk are: (1) actual or constructive knowledge of the risk, and (2) consent by the plaintiff to assume that risk." *Allred v. Capital Area Soccer League, Inc.*, 194 N.C. App. 280, 287, 669 S.E.2d 777, 781 (2008) (citation omitted); *see also Batton v. R.R.*, 212 N.C. 256, 268, 193 S.E. 674, 684 (1937) ("Assumption of risk is founded upon knowledge of [an] employee, either actual or constructive, of the risks and hazards to be encountered in the performance of his duties and his consent to take the chance of injury therefrom." (citation and quotation marks omitted)). The defense of assumption of risk "[is] affirmative and require[s] a showing on the part of the defendant to be considered at all; and to prevail as a matter of law, . . . it must plainly appear from the evidence that a reasonable mind could draw no other inference." *Bruce v. Flying Service*, 231 N.C. 181, 188, 56 S.E.2d 560, 564 (1949). This Court has held that, before an employee will be treated as having assumed the risks of his employment, he "must (or reasonably should) have been aware of the dangers involved and, in addition, must (or reasonably should) have appreciated the danger and risk connected with the [] conditions leading to his injury; and [] in case of any doubt the question is ordinarily one for the jury." *May v. Mitchell*, 9 N.C. App. 298, 303-04, 176 S.E.2d 3, 7 (1970) (citation and quotation marks omitted) (emphasis in original).

Here, Defendant's arguments in support of the assumption of risk defense are not materially distinguishable from its arguments concerning Plaintiff's ability to state a claim for relief. Defendant argues it is entitled to prevail based on the defense of assumption of risk because Plaintiff "took part in the blasting activity as an employee of the blasting company . . . performing work at the [construction] site[]" and because

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“Plaintiff[]’s scope of work included him being in proximity to blasts.” Again, Defendant does not cite any North Carolina case law in support of its argument that Plaintiff’s complaint “makes it clear that Plaintiff[] assumed the risk associated with blasting and therefore he cannot bring a strict liability claim against [Defendant].”

As in *Vecellio*, we find it unnecessary to reach the question of whether, as a general matter, assumption of risk is available as a defense to a strict liability claim arising from an ultrahazardous activity. The mere facts that Plaintiff was employed by a company whose services included blasting, and that he came “within [] range of the blasting activity” on the date of his injuries, are insufficient to establish *as a matter of law* that Plaintiff “assumed the risks” of blasting. According to Plaintiff’s complaint, Plaintiff was not employed as a blaster and, immediately prior to the blast that caused his injuries, he believed he was located at a safe distance from the blast. Based on the facts alleged in Plaintiff’s complaint, we cannot say whether proximity to blasting was within Plaintiff’s “scope of work,” whether Plaintiff “took part” in the blast that resulted in his injuries; or whether it was reasonable for Plaintiff to rely upon the assurances of the blaster-in-charge about being at a safe distance from the blast. Even assuming *arguendo* that the defense of assumption of risk can apply to strict liability claims for blasting, we are not persuaded that Plaintiff’s complaint *clearly shows* Plaintiff had actual or constructive knowledge of the risks of blasting, or that he consented to assume those risks.³ See *Andrews v. Elliot*, 109 N.C. App. 271, 275, 426 S.E.2d 430, 432 (1993) (reversing 12(b)(6) dismissal of plaintiff’s complaint, where “plaintiff adequately alleged the essential elements of a claim for defamation *per se*,” and “plaintiff’s complaint on its face [did not] disclose[] in defendant’s favor the affirmative defense of absolute or qualified privilege.”); cf. *Holleman v. Aiken*, 193 N.C. App. 484, 497, 668 S.E.2d 579, 588 (2008) (affirming 12(b)(6) dismissal of plaintiff’s libel claim based on the defense of truthfulness, because “from plaintiff’s own complaint it [was] clear that some of the alleged defamatory statements [were] true.”).

“We emphasize that our holding addresses the pleading stage only. We cannot predict whether a developed record will support [Plaintiff’s]

3. We observe our Supreme Court has held that “assumption of risk is not available as a defense to one not in a contractual relationship to the plaintiff.” *McWilliams v. Parham*, 269 N.C. 162, 166, 152 S.E.2d 117, 120 (1967); see also *Clark v. Freight Carriers*, 247 N.C. 705, 709, 102 S.E.2d 252, 255 (1958) (finding that, where there was “no allegation in the pleadings tending to show any contractual relationship between the plaintiff and the [] defendants, the doctrine of assumption of risk [was] not available as a defense.” (citations omitted)).

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allegations[.]” *Fussell*, 364 N.C. at 228, 695 S.E.2d at 441. We hold only that Plaintiff’s complaint, construed liberally, states a strict liability claim for blasting-related injuries “sufficient to withstand a motion to dismiss filed pursuant to Rule 12(b)(6).” *Id.* at 228, 695 S.E.2d at 442. In *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970), our Supreme Court discussed the concept of foreseeable risk as a limit on a defendant’s liability for negligence. The *Sutton* Court concluded that, although the plaintiff’s complaint alleged facts that *seemed to suggest* the absence of foreseeable risk on the part of the defendants, the Court

[could not] say on the basis of the ‘bare bones pleadings’ that [the] plaintiff cannot prove otherwise, or that he can prove no facts which would entitle him to recover from [the] defendants . . . for the damages resulting from the [incident alleged]. To dismiss the action now would be “to go too fast too soon.” This case is not yet ripe for a determination that there can be no liability as a matter of law.

277 N.C. at 108, 176 S.E.2d at 169 (citations omitted). In the present case, we likewise find it “too early in [] [P]laintiff’s action for us to say to a certainty that [] [P]laintiff is entitled to no relief under any set of facts he might prove in support of his claim.” *Boston*, 73 N.C. App. at 460, 326 S.E.2d at 106.

III. Conclusion

Considering our limited precedent on strict liability for blasting and the lack of North Carolina case law involving the specific factual circumstances presented here, we cannot say “it appears *beyond doubt* that [] [P]laintiff can prove no set of facts in support of his claim which would entitle him to relief.” See *Hull v. Floyd S. Pike Electrical Contractor*, 64 N.C. App. 379, 380, 307 S.E.2d 404, 406 (1983) (citation omitted) (emphasis added). Accordingly, we conclude the trial court improperly dismissed Plaintiff’s strict liability claim against Defendant. We therefore reverse the trial court’s order granting Defendant’s motion to dismiss and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judge STROUD concurs.

Judge MURPHY concurs in result only.

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[261 N.C. App. 157 (2018)]

THOMAS STEVEN HENSON, PLAINTIFF

v.

ROBIN BLACK HENSON, DEFENDANT

No. COA18-110

Filed 4 September 2018

Jurisdiction—subject matter—modification of order by trial court—during pendency of appeal

The trial court in an equitable distribution case lacked subject matter jurisdiction to enter an order modifying the language of a prior equitable order directing the distribution of the husband's retirement account, where the prior order had been appealed to the Court of Appeals and that court's mandate had not yet issued.

Appeal by plaintiff from judgment entered 20 June and 23 October 2017 by Judge D. Brent Cloninger in Cabarrus County District Court. Heard in the Court of Appeals 8 August 2018.

Kenneth P. Andresen, PLLC, by Kenneth P. Andresen, for plaintiff-appellant.

Ferguson, Hayes, Hawkins & DeMay, PLLC, by James R. DeMay, for defendant-appellee

ZACHARY, Judge.

Plaintiff-Husband Thomas Steven Henson appeals from the trial court's Domestic Relations Order and Order Denying Rule 60 Motion. Because the trial court lacked subject-matter jurisdiction to enter the Domestic Relations Order, we reverse the Order Denying Rule 60 Motion and vacate the Domestic Relations Order.

Background

Plaintiff-Husband Thomas Steven Henson and Defendant-Wife Robin Black Henson married in June 1984 and separated in October 2010. Plaintiff-Husband filed a complaint seeking absolute divorce and equitable distribution on 8 December 2011. On 4 January 2012, Defendant-Wife filed an answer and counterclaim for equitable distribution, post-separation support, and alimony.

The trial court entered an Equitable Distribution Order on 11 August 2015. Among the items distributed was Plaintiff-Husband's simplified

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employment pension IRA account (“SEP IRA”). While the parties stipulated that the SEP IRA was worth \$51,524.00 at the time of separation, the SEP IRA had accumulated an additional \$30,000 to \$40,000 in growth by the date of the equitable distribution hearing. Neither party contributed to the SEP IRA after the date of separation, and Plaintiff-Husband maintained that any growth in the value of the SEP IRA following separation was passive. At trial, Plaintiff-Husband stated that he wanted to keep the SEP IRA “to let it keep earning money.”

The parties each submitted to the trial court a proposed equitable distribution order. Plaintiff-Husband’s proposed equitable distribution order suggested the following in regard to the SEP IRA:

Anderson and Strudwick SEP which is Plaintiff’s retirement account with a stipulated value of \$51,524.00 and Anderson and Strudwick IRA with a value of \$4,783.67 which is Defendant’s account. The IRA at a value of \$4,783.67 is distributed to the Defendant and the SEP value of \$51,524.00 is distributed to the Defendant.

Defendant-Wife, however, proposed that

[t]he Anderson & Strudwick account should be distributed to the defendant in the amount of \$51,524.00 as well as passive gains and losses subsequently thereafter.

The trial court’s Equitable Distribution Order ultimately adopted Plaintiff-Husband’s proposed order as it pertained to the SEP IRA, and distributed the account as follows:

Anderson and Strudwick SEP which is Plaintiff’s retirement account with a stipulated value of \$51,524.00 and Anderson and Strudwick IRA with a value of \$4,783.67 which is Defendant’s account. The IRA at a value of \$4,783.67 is distributed to the Defendant and the SEP value of \$51,524.00 is distributed to the Defendant.

Defendant-Wife filed notice of appeal from the Equitable Distribution Order on 10 September 2015. However, Defendant-Wife did not challenge the trial court’s distribution of the SEP IRA in that appeal. On 6 June 2017, this Court filed an opinion in Defendant-Wife’s appeal affirming in part and reversing and remanding in part the trial court’s order. The mandate was issued on 26 June 2017.

On 2 June 2017, four days prior to the issuance of this Court’s opinion, Defendant-Wife’s counsel sent an e-mail notifying both

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Plaintiff-Husband's trial and appellate counsel of a proposed Domestic Relations Order regarding the SEP IRA. Defendant-Wife's proposed Domestic Relations Order provided that

There were no contributions by the [Plaintiff-Husband] into the SEP IRA since date of separation, therefore, the SEP IRA, inclusive of gains and losses since date of separation of the parties, is to be conveyed to the [Defendant-Wife], in its entirety inclusive of gains and losses since date of separation.

A "read receipt" showed that the e-mail had been read; however, Defendant-Wife's counsel did not receive a response from Plaintiff-Husband's counsel. On 15 June 2017, Defendant-Wife submitted the proposed Domestic Relations Order to the trial court, along with a "Verification of Consultation With Opposing Counsel" indicating that Plaintiff-Husband's "counsel has not responded and this proposed judgment/order is submitted for your consideration." The trial court entered Defendant-Wife's proposed Domestic Relations Order on 20 June 2017 ("Domestic Relations Order").

On 11 July 2017, Plaintiff-Husband filed a Rule 60 Motion requesting that the Domestic Relations Order be set aside for surprise or inadvertence. Plaintiff-Husband also filed a Motion to Stay enforcement of the order, which the trial court granted on 28 July 2017. The trial court denied Plaintiff-Husband's Rule 60 Motion following a hearing on 23 October 2017. Plaintiff-Husband appeals.

Discussion

On appeal, Plaintiff-Husband argues that the trial court erred in entering the Domestic Relations Order and denying his Rule 60 Motion (1) because the trial court lacked subject-matter jurisdiction over matters contained within the earlier Equitable Distribution Order by virtue of Defendant-Wife's appeal; (2) because the Domestic Relations Order "substantively altered" the Equitable Distribution Order despite not having been based on (a) "a properly filed motion seeking to either [] alter or obtain relief from the" Equitable Distribution Order or (b) "any showing of extraordinary circumstances and that justice demanded the alteration"; and (3) because the issue of the SEP IRA's gains and losses had been abandoned due to Defendant-Wife's failure to raise it in her first appeal.

We first address Plaintiff-Husband's argument concerning the trial court's jurisdiction to enter the Domestic Relations Order, as we find it dispositive.

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I.

“Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal.” *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted). “[A]n appellate court has the power to inquire into [subject-matter] jurisdiction in a case before it at any time, even *sua sponte*.” *Lee v. Winget Rd., LLC*, 204 N.C. App. 96, 98, 693 S.E.2d 684, 687 (2010) (citation and quotation marks omitted).

II.

Initially, Defendant-Wife contends that subject-matter jurisdiction was not a bar to the trial court’s Domestic Relations Order because that order “did not alter or modify the equitable distribution order.” Rather, Defendant-Wife maintains that the Equitable Distribution Order should be interpreted as distributing to her the “*entire*” value of the SEP IRA, inclusive of any passive gains. Defendant-Wife’s logic is that (1) the Equitable Distribution Order intended for her to receive the entire value of the SEP IRA; (2) the Domestic Relations Order stated the same; and (3) therefore, in that it made no alteration to the Equitable Distribution Order, her pending appeal did not divest the trial court of jurisdiction to enter the Domestic Relations Order. Because this argument contravenes the express language found in the Equitable Distribution and Domestic Relations Orders, we disagree.

Although Defendant-Wife repeatedly asserts that the Equitable Distribution Order awarded her “the entire SEP,” this mischaracterizes the plain language of the trial court’s Equitable Distribution Order, which ordered only that “the SEP value of \$51,524.00 is distributed to the Defendant[-Wife].” Nowhere in the Equitable Distribution Order does the word “entire” or “entirety” appear. On the other hand, the Domestic Relations Order required that “[t]he SEP IRA shall distribute to [Defendant-Wife] . . . *in its entirety inclusive of gains and losses* since date of separation[.]” (emphasis added). The Domestic Relations Order thus effectively distributed an additional value of roughly \$30-\$40,000 in passive growth to Defendant-Wife which the Equitable Distribution Order, by its express language, did not.

Moreover, the fact that the Domestic Relations Order amended the original Equitable Distribution Order is further evidenced by the parties’ proposed Equitable Distribution Orders. Defendant-Wife’s proposed order requested that distribution of the SEP IRA include all passive gains and losses subsequent to the date of separation. However, the trial court rejected that proposal, opting instead to adopt the exact language contained in Plaintiff-Husband’s proposed order. The trial court’s exclusion

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of any language awarding passive gains and losses in the account to Defendant-Wife demonstrates the unambiguous nature of the Equitable Distribution Order, with which the subsequent Domestic Relations Order was in direct contradiction.

Accordingly, we reject Defendant-Wife's assertion that the Domestic Relations Order did nothing to alter or amend the original Equitable Distribution Order's distribution of Plaintiff-Husband's SEP IRA. The Domestic Relations Order did just that. Therefore, we must consider whether the trial court had jurisdiction to make such an amendment.

III.

Plaintiff-Husband argues that Defendant-Wife's appeal from the Equitable Distribution Order divested the trial court of subject-matter jurisdiction over matters contained therein until this Court returned the case to the trial court by mandate on 26 June 2017. Because the trial court entered the Domestic Relations Order six days prior to the return of this Court's mandate, Plaintiff-Husband maintains that the Domestic Relations Order is void. On the other hand, Defendant-Wife argues that the trial court maintained jurisdiction over distribution of the SEP IRA account because it "was not an issue raised in Wife's prior appeal." We find Plaintiff-Husband's arguments persuasive.

"[W]hen an order arising from a domestic case is appealed, the cause is taken out of the jurisdiction of the trial court and put into the jurisdiction of the appellate court." *Traywick v. Traywick*, 31 N.C. App. 363, 366, 229 S.E.2d 220, 221 (1976). The general rule is that "an appeal from a trial court order 'stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein.'" *In re J.F.*, 237 N.C. App. 218, 227, 766 S.E.2d 341, 348 (2014) (quoting N.C. Gen. Stat. § 1-294 (2017)). At this stage in the proceedings, "[t]he lower court only retains jurisdiction to take action which aids the appeal and to hear motions and grant orders that do not concern the subject matter of the suit and are not affected by the judgment that has been appealed." *Ross v. Ross*, 194 N.C. App. 365, 368, 669 S.E.2d 828, 831 (2008). Otherwise, the trial court will regain its jurisdiction only after the appellate review has been completed, which occurs when "the cause is returned by the mandate of [the appellate] [c]ourt." *Joyner v. Joyner*, 256 N.C. 588, 591, 124 S.E.2d 724, 726 (1962). "[A]ny proceedings in the trial court after the notice of appeal are void for lack of jurisdiction." *Romulus v. Romulus*, 216 N.C. App. 28, 33, 715 S.E.2d 889, 892 (2011) (citation omitted).

In the instant case, as explained above, the subject-matter of the Equitable Distribution Order embraced the appropriate distribution of Plaintiff-Husband's SEP IRA account. Because distribution of the

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SEP IRA was included within the Equitable Distribution Order, the trial court was divested of jurisdiction over that matter while the Equitable Distribution Order was pending appeal. *Jenkins v. Wheeler*, 72 N.C. App. 363, 365, 325 S.E.2d 4, 5 (1985) (“An appeal stays further proceedings in the lower court upon the *judgment appealed and matters embraced within that judgment.*”) (alteration in original) (citations omitted). While Defendant-Wife maintains that “[t]he trial court retains jurisdiction during the pendency of an appeal to enter orders on matters not affected by the appeal,” the well-settled rule is that “[a] trial court may proceed upon any matter not affected by the *judgment* appealed from.” *Upton v. Upton*, 14 N.C. App. 107, 109, 187 S.E.2d 387, 389 (1972) (emphasis added); see also *Carpenter v. Carpenter*, 25 N.C. App. 307, 308, 212 S.E.2d 915, 916 (1975) (“As a general rule an appeal takes the *case* out of the jurisdiction of the trial court[.]”) (emphasis added) (citations omitted). The trial court was thus divested of its jurisdiction over matters contained within the equitable distribution judgment *as a whole* at the moment Defendant-Wife perfected her appeal from that judgment.

Nor, as Defendant-Wife argues, does the fact that the SEP IRA portion of the Equitable Distribution Order “is a judgment directing the payment of money” vest the trial court with continuing jurisdiction over that matter. See *Romulus*, 216 N.C. App. at 37, 715 S.E.2d at 895 (“[A]lthough an equitable distribution distributive award is theoretically a ‘judgment directing the payment of money’ which is enforceable during the pendency of an appeal . . . , the trial court does not have jurisdiction after notice of appeal is given to determine the amount of periodic payments which have come due and remain unpaid during the pendency of the appeal and to reduce that sum to an enforceable judgment.”). This is particularly so where the trial court has sought to exercise its jurisdiction in order to alter or amend a component of the original distributive award.

In sum, because the Equitable Distribution Order determined how the SEP IRA account would be distributed, the trial court did not have jurisdiction to enter a subsequent Domestic Relations Order modifying the language of that portion of the Equitable Distribution Order prior to issuance of this Court’s mandate on 26 June 2017. Accordingly, because the trial court was without subject-matter jurisdiction to enter the Domestic Relations Order on 20 June 2017, we reverse the trial court’s order denying Plaintiff-Husband’s Rule 60 Motion and vacate the Domestic Relations Order.

VACATED.

Judges ELMORE and HUNTER, JR. concur.

IN RE J.M.K.

[261 N.C. App. 163 (2018)]

IN THE MATTER OF J.M.K.

No. COA18-451

Filed 4 September 2018

1. Termination of Parental Rights—petition—failure to allege ground—basis for termination

The trial court erred by concluding that grounds existed to terminate a father's parental rights to his daughter on the ground of abandonment where the termination petition did not allege that ground and thus did not put the father on notice of that ground as a potential basis for termination.

2. Termination of Parental Rights—grounds for termination—failure to pay child support—existence of child support order

The trial court erred by concluding that grounds existed to terminate a father's parental rights to his daughter on the ground of failure to pay child support where there was no evidence that he had any court-ordered obligation to pay child support.

3. Termination of Parental Rights—grounds for termination—failure to legitimate—required statutory findings of fact

The trial court erred by concluding that grounds existed to terminate a father's parental rights to his daughter on the ground of failure to legitimate where the trial court failed to make the required findings of fact as to each of the five subsections in N.C.G.S. § 7B-1111(a)(5).

Appeal by respondent from order entered 29 November 2017 by Judge Andrea F. Dray in Buncombe County District Court. Heard in the Court of Appeals 16 August 2018.

Siemens Family Law Group, by Diane K. McDonald, for petitioner-appellee mother.

Rebekah W. Davis for respondent-appellant father.

ZACHARY, Judge.

IN RE J.M.K.

[261 N.C. App. 163 (2018)]

This is a private termination action between two parents. Respondent-father appeals the termination of his parental rights to the minor child, J.M.K. (“Jessica”).¹ We reverse.

I. Background

The parties were in a relationship and lived together from February until September of 2014, but never married. During their relationship, Jessica was conceived. On 2 October 2014, petitioner-mother, who was pregnant, filed a complaint and motion for domestic violence protective order alleging that respondent-father destroyed the interior of her mobile home during a fit of rage. The trial court entered an *ex parte* domestic violence protective order the same day and subsequently entered a one-year domestic violence protective order on 4 December 2014.

Jessica was born at the beginning of May 2015. There was no father listed on her birth certificate, and petitioner-mother did not inform respondent-father of the birth. On 7 May 2015, respondent-father filed a *pro se*, verified complaint for custody, alleging that he was Jessica’s father. On 29 May 2015, petitioner-mother filed an answer and counterclaim, in which she “neither admitted nor denied” that respondent-father was Jessica’s father. Respondent-father failed to attend the resulting custody hearing, having been incarcerated for violating the terms of the domestic violence protective order. On 22 September 2015, the trial court entered an order awarding sole legal and physical custody to petitioner-mother.

On 15 July 2016, respondent-father filed a motion to modify the child custody order. On 27 July 2016, petitioner-mother filed a motion to dismiss respondent-father’s motion, arguing that he had failed to establish paternity, or in the alternative, a motion for child support. On 24 October 2016, the trial court entered an order granting the motion to dismiss. The dismissal order noted that the prior custody order did not include a finding that respondent-father was Jessica’s father.

On 19 July 2017, petitioner-mother filed a petition to terminate respondent-father’s parental rights on the grounds of failure to pay child support and failure to legitimate. *See* N.C. Gen. Stat. § 7B-1111(a)(4)-(5) (2017). Respondent-father was appointed counsel, but he did not file an answer. The petition was heard on 28 November 2017. On 29 November 2017, the trial court entered an order terminating respondent-father’s

1. A pseudonym is used to protect the identity of the minor child and for ease of reading.

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parental rights to Jessica. Respondent-father entered timely notice of appeal.²

II. Grounds for Termination

[1] Respondent-father argues that the trial court erred by concluding that grounds existed to terminate his parental rights. We agree.

This Court reviews an order terminating parental rights to determine “whether the trial court’s findings of fact were based on clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental termination should occur[.]” *In re Oghenekevebe*, 123 N.C. App. 434, 435-36, 473 S.E.2d 393, 395 (1996) (citation omitted). “[T]he trial court must enter sufficient findings of fact and conclusions of law to reveal the reasoning which led to the court’s ultimate decision.” *In re D.R.B.*, 182 N.C. App. 733, 736, 643 S.E.2d 77, 79 (2007).

In this case, the trial court made the following conclusion as to the grounds for terminating respondent-father’s parental rights:

That, pursuant to N.C.G.S. § 7B-1111, the Respondent, has abandoned the minor child for more than 6 months preceding the filing of the Petition. The Respondent has failed to visit with the minor child or inquire about her wellbeing. That the Respondent has failed to provide any financial or material support for the benefit of the minor child since the birth of the minor child. That the Respondent has failed to legitimate the minor child, has failed to file an affidavit of paternity in a central registry maintained by the Department of Health and Human Services. That the Respondent did not legitimate the minor child through marriage to the Petitioner mother. That the Respondent has failed to perform the natural and legal obligations of parental care and support, has failed to legitimate the minor child, and has withheld his presence, his love and care, to the detriment of the minor child.

The trial court’s order does not specifically list any of the enumerated statutory grounds for termination. *See* N.C. Gen. Stat. § 7B-1111(a)(2017). However, the language included in this conclusion would potentially

2. Although the termination order was entered on 29 November 2017, respondent did not file notice of appeal until 19 February 2018 because the order was not served on respondent until 12 February 2018. *See* N.C. Gen. Stat. § 7B-1001(b) (2017) (“Notice of appeal . . . shall be made within 30 days after entry and service of the order . . .”).

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provide the basis for three distinct grounds for termination: abandonment under section (a)(7), failure to pay child support under section (a)(4), and failure to legitimate under section (a)(5). We will review each of these grounds in turn.³

The petition filed in this matter only alleged two grounds for termination: failure to pay child support and failure to legitimate. There is nothing in the petition that would have put respondent-father on notice that his parental rights were subject to termination based on abandonment under N.C. Gen. Stat. § 7B-1111(a)(7). As a result, the trial court's conclusion that this ground existed must be reversed. *See In re C.W.*, 182 N.C. App. 214, 228-29, 641 S.E.2d 725, 735 (2007) ("Because it is undisputed that DSS did not allege abandonment as a ground for termination of parental rights, respondent had no notice that abandonment would be at issue during the termination hearing. Accordingly, the trial court erred by terminating respondent's parental rights based on this ground.").

[2] Next, the trial court concluded that respondent-father's parental rights were subject to termination on the ground of failure to pay child support. " [I]n a termination action pursuant to this ground, petitioner must prove the existence of a support order that was enforceable during the year before the termination petition was filed.' " *In re D.T.L.*, 219 N.C. App. 219, 221, 722 S.E.2d 516, 518 (2012) (*quoting In re Roberson*, 97 N.C. App. 277, 281, 387 S.E.2d 668, 670 (1990)). Here, there was no evidence that respondent-father had any court-ordered obligation to pay child support. Consequently, the trial court's conclusion that this ground existed must also be reversed.

[3] Finally, the trial court concluded that respondent-father's parental rights were subject to termination based on his failure to legitimate Jessica pursuant to N.C. Gen. Stat. § 7B-1111(a)(5). This section provides that a court may terminate the parental rights of the father of a juvenile born out of wedlock upon a finding that the father has not, prior to the filing of the petition to terminate parental rights:

- a. Filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services;

3. In his brief, respondent-father also argues that the trial court erred by concluding that his rights were subject to termination on the ground of neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). However, this ground was not alleged in the petition and the trial court's conclusion does not adequately suggest the court determined this ground existed. *See In re O.J.R.*, 239 N.C. App. 329, 339, 769 S.E.2d 631, 638 (2015) ("If the trial court meant to terminate Respondent's parental rights [based on a specific ground], the trial court needs to provide both sufficient findings of fact and conclusions of law indicating that the trial court is proceeding pursuant to [that ground]."). Consequently, it is unnecessary to address this argument.

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provided, the petitioner or movant shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and the Department's certified reply shall be submitted to and considered by the court.

b. Legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose.

c. Legitimated the juvenile by marriage to the mother of the juvenile.

d. Provided substantial financial support or consistent care with respect to the juvenile and mother.

e. Established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

N.C. Gen. Stat. § 7B-1111(a)(5)(2017). "When basing the termination of parental rights on [N.C. Gen. Stat. § 7B-1111(a)(5),] the court must make *specific findings of fact* as to [each] subsection[.]" *In re I.S.*, 170 N.C. App. 78, 88, 611 S.E.2d 467, 473 (2005) (emphasis added). But the trial court only addressed subsections (a), (c), and (d) of this ground in the termination order. The order does not address subsection (b), whether respondent-father legitimated Jessica pursuant to N.C. Gen. Stat. §§ 49-10, or 49-12.1, or subsection (e), whether respondent-father established paternity through N.C. Gen. Stat. §§ 49-14, 110-132, 130A-101, 130A-118 or through any "other judicial proceeding." Because the trial court failed to make required findings under N.C. Gen. Stat. § 7B-1111(a)(5), the trial court's conclusion that respondent-father's rights were subject to termination on the ground of failure to legitimate must also be reversed.

III. Conclusion

The facts found by the trial court are insufficient to establish grounds for terminating respondent-father's parental rights, in that 1) the petition to terminate respondent-father's parental rights did not allege abandonment as a ground for termination; 2) there was no finding and no evidence of a court order requiring respondent to pay child support; and 3) the termination order did not make all of the required findings under N.C. Gen. Stat. § 7B-1111(a)(5) (2017). Thus, the termination order is reversed.

REVERSED.

Judges ELMORE and DAVIS concur.

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[261 N.C. App. 168 (2018)]

BASMA KHATIB, A/K/A BASMA BADRAN NABABTEH, PLAINTIFF

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA17-1430

Filed 4 September 2018

1. Appeal and Error—abandonment of argument—challenged findings of fact—failure to specify argument

Where a plaintiff appealing an order of the Industrial Commission challenged certain findings of fact but failed to specifically argue how those findings were unsupported by record evidence, the issue was deemed abandoned pursuant to Rule of Appellate Procedure 28(b)(6).

2. Tort Claims Act—bars to recovery—contributory negligence—falling in uncovered storm drain

Where plaintiff was injured falling into an uncovered storm drain and brought a negligence claim against the N.C. Department of Transportation under the Tort Claims Act, her claim was barred by her own contributory negligence in deviating from an intended pedestrian crosswalk path onto a grassy median and failing to keep a proper lookout.

Appeal by plaintiff from decision and order entered 23 August 2017 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 August 2018.

Bryant Duke Paris III PLLC, by Bryant Duke Paris III, for plaintiff-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alesia M. Balshakova, for defendant-appellee.

ELMORE, Judge.

Plaintiff Basma Khatib appeals a decision and order of the North Carolina Industrial Commission denying her negligence claim against the North Carolina Department of Transportation (“NCDOT”). Khatib sustained injuries after she admittedly deviated from a pedestrian crosswalk to cut across a grass median and stepped into an uncovered storm drain, falling five feet underground. She sued the NCDOT in the

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Industrial Commission under the Tort Claims Act, *see* N.C. Gen. Stat. § 143-293, alleging that the NCDOT negligently failed to inspect and maintain the storm drain because when she fell into it, the grate normally covering the storm drain had been removed and was lying a few feet away. The Commission denied Khatib's claim in relevant part because it concluded she was contributorily negligent "when she chose to deviate from the marked crosswalk and run across the grassy median without keeping a proper lookout."

On appeal, Khatib contends the Commission erred by finding and concluding (1) the NCDOT owed her no duty to exercise reasonable care in maintaining its storm drain; (2) the NCDOT did not negligently breach this duty; and (3) Khatib's claim was barred by contributory negligence. Because we hold the Commission's challenged findings were supported by competent evidence, which in turn supported its conclusion that Khatib's claim was barred by her own contributory negligence, we affirm the Commission's decision and order on this basis.

I. Background

On 26 June 2011, Khatib's husband dropped her off to go for a jog near Centennial Parkway in Raleigh. At that time, Entrepreneur Drive formed a T-intersection with Centennial Parkway, and all four directions contained a pedestrian crosswalk that covered the entire square of the intersection. To the west, Entrepreneur Drive's four driving lanes dead-ended a few car lengths from the intersection, providing just enough space for cars to park, and those four lanes were center divided by a curbed grass median. The grass median extended east beyond the crosswalk, at which point it became a sidewalk that connected the two segments of crosswalk. A storm drain lie on the road adjacent to the northward facing curb of the grass median, a few feet west of the crosswalk. For reasons unknown, and first discovered by the NCDOT when it learned of Khatib's fall, the grate normally covering that storm drain had been removed and was lying a few feet away.

At approximately 8:00 p.m., Khatib called her husband to pick her up. Khatib continued jogging northbound on Centennial Drive's sidewalk as her husband, who had been driving southbound on Centennial Drive, pulled his car nose first into the northernmost lane of the westbound dead-end segment of Entrepreneur Drive and parked to wait for her. When Khatib saw her husband's vehicle, she chose not to follow the pedestrian crosswalk path behind the car to enter its passenger-side door but instead cut across the grass median to pass by the front of the car. Unfortunately, when Khatib stepped off the grass median's curb, she

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stepped into the uncovered storm drain, fell approximately five feet, and sustained injuries.

Khatib sued the NCDOT under the Tort Claims Act for negligence. After a deputy commissioner dismissed her claim with prejudice based, in relevant part, on his conclusion that Khatib's claim was barred by her own contributory negligence, Khatib appealed to the Full Commission. After a hearing, the Commission entered a decision and order on 23 August 2017 affirming the deputy commissioner's decision, thereby denying Khatib's negligence claim against the NCDOT. In relevant part, the Commission found "[t]he hole [caused by the uncovered storm drain in which Khatib fell] was visible to anyone approaching, so long as they were keeping a proper lookout[.]" and Khatib's "failure to use the designated crosswalk and failure to pay attention to her surroundings, including the conditions of her path, when crossing the median were the proximate cause of plaintiff's fall and were not reasonable considering the circumstances." The Commission thus concluded that Khatib "failed to exercise the standard of care that a person of ordinary prudence would demonstrate when she chose to deviate from the marked crosswalk and run across the grassy median without keeping a proper lookout" and, therefore, that she was "barred from recovery under the Tort Claims Act on the basis of contributory negligence." Khatib appeals.

II. Analysis

On appeal, Khatib asserts the Commission erred by not (1) concluding the NCDOT owed her a duty to exercise reasonable care in maintaining its storm drain; (2) finding and concluding that the NCDOT's negligence caused her injuries; and (3) finding and concluding Khatib had not been contributorily negligent. Because we conclude the Commission's findings supported its conclusion that Khatib's claim was barred by contributory negligence, we affirm the Commission's decision and order on this basis and need not address the first two issues presented on appeal. *Cf. State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957) ("[A] correct decision of a lower court will not be disturbed because a wrong or insufficient or superfluous reason is assigned." (citation omitted)).

A. Review Standard

"The standard of review for an appeal from a decision by the Full Commission under the Tort[] Claims Act 'shall be for errors of law under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them.'" *Webb v. N.C. Dep't*

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of *Transp.*, 180 N.C. App. 466, 467, 637 S.E.2d 304, 305 (2006) (quoting N.C. Gen. Stat. § 143-293 (2005)). “[W]hen considering an appeal from the Full Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission’s findings of fact, and (2) whether the Full Commission’s findings of fact justify its conclusions of law and decision.” *Id.* at 467–68, 637 S.E.2d at 305 (brackets omitted) (quoting *Simmons v. N.C. Dep’t. of Transp.*, 128 N.C. App. 402, 405–06, 496 S.E.2d 790, 793 (1998)).

B. Contributory Negligence

[1] Khatib asserts the Commission erred “when it failed to find as fact and conclude as a matter of law . . . that [she] was not guilty of contributory negligence.” Khatib also contends the Commission’s findings numbered 5, 7, and 8, as well as its legal conclusion numbered 11, which Khatib argues is actually a finding, were not supported by competent evidence. We disagree.

Contributory negligence is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains. In order to prove contributory negligence on the part of a plaintiff, the defendant must demonstrate: (1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff’s negligence and the injury. However, a plaintiff may relieve the defendant of the burden of showing contributory negligence when it appears from the plaintiff’s own evidence that he was contributorily negligent.

Proffitt v. Gosnell, ___ N.C. App. ___, ___, 809 S.E.2d 200, 204 (2017) (citations, quotation marks, and brackets omitted).

The Commission made the following challenged findings and conclusion to support its determination that Khatib’s claim was barred by contributory negligence:

5. Plaintiff saw her husband’s vehicle and jogged toward[s] it. Plaintiff was running on the sidewalk then cut through the grass median away from the crosswalk and toward[s] the front of the vehicle. When she reached the curb of the median and stepped down, plaintiff fell into the uncovered storm drain, approximately five feet to the bottom.

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7. [sic] According to plaintiff, at the time of the incident it was not dark, the weather was nice, and she “could see perfectly well.” Plaintiff was focused on looking at her husband’s vehicle. She was not looking at the sidewalk, the conditions of her chosen path of travel, or the terrain in front of her. The hole was visible to anyone approaching, so long as they were keeping a proper lookout.

8. [sic] Plaintiff testified that she did not use the designated crosswalk to get to the vehicle even though access to the crosswalk was available. . . . [P]laintiff’s failure to use the designated crosswalk and failure to pay attention to her surroundings, including the conditions of her path, when crossing the median were the proximate cause of plaintiff’s fall and were not reasonable considering the circumstances. Based on the preponderance of the evidence, plaintiff was contributorily negligent in causing the fall into the storm drain.

. . . .

11. . . . [P]laintiff failed to exercise the standard of care that a person of ordinary prudence would demonstrate when she chose to deviate from the marked crosswalk and run across the grassy median without keeping a proper lookout. Accordingly, the Commission concludes that plaintiff is barred from recovery under the Tort Claims Act on the basis of contributory negligence.

However, as Khatib has failed to specifically argue how these findings were unsupported by record evidence, she has abandoned her purported evidentiary challenge to these findings. *See* N.C. R. App. P. 28(b)(6). Nonetheless, despite Khatib not mounting a proper substantial evidence challenge to the Commission’s findings, our review reveals these findings were adequately supported by the record.

According to Khatib’s own testimony, when her husband arrived to pick her up, it “wasn’t dark,” “[t]he weather was nice[,] and [she] could see perfectly well.” When Khatib saw her husband’s car arrive, she was looking “toward[] the car” and “could see [her husband] and . . . children,” but could not see “anything else in front of [her],” including the “sidewalk.” Khatib confirmed that “at the time [she was] approaching [her] husband’s vehicle [she] was looking at him and [her] children” and was “not looking down at [her] feet” to see where she was walking. Khatib also confirmed that, rather than following the pedestrian-crosswalk path

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behind the car in order to get to the passenger-side door, she cut through the grass median outside of the crosswalk path to pass in front of the car. Having concluded the evidentiary portions of these findings were supported by the record, we turn to whether these findings supported the Commission's conclusion that Khatib's claim was barred by her own contributory negligence.

[2] In her brief, Khatib concedes that, as she “was in the process of being reunited with her family at the conclusion of her exercise, she saw the family vehicle, [her husband], and her children and *was briefly distracted from watching where she was going.*” (Emphasis added.) Nonetheless, she relies on *Kremer v. Food Lion, Inc.*, 102 N.C. App. 291, 295, 401 S.E.2d 837, 839 (1991) (“Although failure to discover an obvious defect will usually be considered contributory negligence as a matter of law, this general rule does not apply when circumstances divert the attention of an ordinarily prudent person from discovering an existing dangerous condition.” (citation omitted)), to support her argument that “competent and substantial evidence mandates a finding of fact that [she] was not guilty of contributory negligence inasmuch as her attention was understandably diverted while she was exercising and it would have been likewise nearly impossible for her to see the uncovered inlet until she was directly on top of it.” *Kremer* is distinguishable because the evidence there showed the plaintiff was walking down a grocery-store aisle intended for customer foot traffic, and Food Lion had placed items above the aisle intended to draw customer attention. After taking two steps into the aisle, the plaintiff fell over misplaced dog food bags. *Id.* at 296, 401 S.E.2d at 839. Here, contrarily, the evidence showed Khatib cut across a grass median outside the designated pedestrian-crosswalk path, and no circumstances attributable to the NCDOT's conduct distracted Khatib's attention. *Webb* controls this case.

In *Webb*, the plaintiff stopped his car at a rest area to purchase a newspaper. 180 N.C. App. at 466, 637 S.E.2d at 305. Although he saw a sidewalk for pedestrian travel that led to the newspaper kiosk, the plaintiff chose a more direct path across the grass and through a shrub bed covered in pine straw, where he was injured after tripping over a hidden metal protrusion. *Id.* at 466–67, 637 S.E.2d at 305. As here, the plaintiff sued the NCDOT for alleged negligence in failure to maintain the grounds, and the Commission concluded his claim was barred by contributory negligence. *Id.* at 467, 637 S.E.2d at 305. On appeal, we affirmed, determining the findings supported an inference that the plaintiff “should have had constructive, if not actual, knowledge that deviating from an intended walking path into pine straw brings with it some

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danger of injury.” *Id.* at 469, 637 S.E.2d at 306. We determined the “plaintiff clearly had the capacity to understand that his shortcut carried a safety risk[,]” and affirmed the Commission’s decision to deny the claim based on the plaintiff’s contributory negligence in deviating from the sidewalk. *Id.*

Here, as in *Webb*, the Commission’s findings support a conclusion that Khatib should have known that deviating from the intended pedestrian-crosswalk path onto the grass median carried some danger of injury, and that her shortcut carried a safety risk. Further, the findings establish, and Khatib conceded below and on appeal, that she was distracted by her family and not looking where she was walking. Accordingly, we hold the Commission’s findings support its conclusion that Khatib’s claim was barred by her own contributory negligence, and affirm its decision and order.

III. Conclusion

The Commission’s relevant challenged findings were supported by the record, which in turn supported its challenged conclusion that Khatib’s claim against the NCDOT was barred by her contributory negligence in deviating from the crosswalk path to cut through the grass median and failing to keep a proper lookout where she was walking. Accordingly, we affirm the Commission’s decision and order denying Khatib’s claim on the basis of contributory negligence.

AFFIRMED.

Judges HUNTER, JR. and ZACHARY concur.

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NNN DURHAM OFFICE PORTFOLIO 1, LLC; ET AL., PLAINTIFFS

v.

GRUBB & ELLIS COMPANY; GRUBB & ELLIS REALTY INVESTORS, LLC;
GRUBB & ELLIS SECURITIES, INC.; NNN DURHAM OFFICE PORTFOLIO, LLC;
AND NNN REALTY ADVISORS, INC., DEFENDANTS

No. COA17-607

Filed 4 September 2018

**Real Property—settlement agreement—assertion of claims—
interpretation—notice requirement**

Pursuant to the plain language of the terms of a settlement agreement, plaintiff property owners were required not only to file a legal action but also to notify defendant property managers by a date certain in order to “duly and timely assert” their claims for damages after a loan default resulted in foreclosure. The trial court should have dismissed all of plaintiffs’ claims as being barred by the settlement agreement because plaintiffs timely filed a claim but did not notify defendants until after the due diligence period specified in the agreement.

Appeal by Plaintiffs from order entered 3 January 2017 by Chief Business Court Judge James L. Gale in Durham County Superior Court, and cross-appeal by Defendants from order entered 3 January 2017 by Chief Business Court Judge James L. Gale in Durham County Superior Court. Heard in the Court of Appeals 6 March 2018.

Stark Law Group, PLLC, by Thomas H. Stark and Seth A. Neyhart, for Plaintiff-Appellants.

Parker Poe Adams & Bernstein LLP, by Charles E. Raynal, IV, Jamie S. Schwedler, and Catherine R.L. Lawson, for Defendant-Appellees Grubb & Ellis Company and Grubb & Ellis Securities, Inc.

Harris Sarratt & Hodges, LLP, by John L. Sarratt, for Defendant-Appellees Grubb & Ellis Realty Investors, LLC, NNN Durham Office Portfolio, LLC and NNN Realty Advisors, Inc.

Penry Riemann, PLLC, by J. Anthony Penry for Appellant – NNN Durham Office Portfolio 1, LLC, et al.

NNN DURHAM OFFICE PORTFOLIO 1, LLC v. GRUBB & ELLIS CO.

[261 N.C. App. 175 (2018)]

North Carolina Department of Secretary of State, by Enforcement Attorney Colin M. Miller, for amici curiae, the North Carolina Secretary of State and the North American Securities Administration Association, Inc.

DILLON, Judge.

I. Summary

Plaintiffs are entities and individuals who invested in a commercial real property transaction. Defendants are entities who marketed the investment and managed the property.

Years later, when the parties lost one of their main tenants and the real property struggled to generate sufficient income to meet expenses, Plaintiffs sought to remove Defendants as the property managers. To settle the matter, the parties entered into an agreement (“Settlement Agreement”) whereby Defendants agreed to step aside as property managers and Plaintiffs agreed to waive all claims they may have had against Defendants.

The real property continued to struggle generating sufficient cash flow to cover all expenses, including debt service, which led to a loan default; and the lender eventually foreclosed. Thereafter, Plaintiffs commenced this action seeking damages against Defendants. Defendants moved for summary judgment on all claims. After a hearing on the matter, the trial court entered an order dismissing *most*, but not all, of Plaintiffs’ claims. Both parties appealed.

We conclude that the trial court should have disposed *all* of Plaintiffs’ claims, based on the Settlement Agreement. We, therefore, affirm in part and reverse in part.

II. Background

In 2006, an affiliate of Highwoods Properties, Inc., (“Highwoods”) owned certain income-producing office buildings in Durham (the “Property”). The Property’s primary tenants and a sub-tenant were affiliates of Duke Hospital (“Duke”). Duke’s lease terms were all set to expire by 2010, and Duke was not ready to commit on extending the lease terms beyond 2010. Highwoods, therefore, decided to market the property for sale while Duke had several years remaining on its lease terms.

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Defendants entered into an agreement with Highwoods to purchase the Property.¹ Defendants' intent in doing so was to remarket the Property to small investors who had recently sold other property and were in the market for a qualified "worry-free" real estate investment as a vehicle to defer tax on capital gains. Before closing, Defendants sought investors to participate in the purchase of the Property. Specifically, Defendants offered an investment vehicle (the "Security") which offered investors tenant-in-common interests in the Property along with Defendants' services to manage the investment.

In early 2007, Defendants successfully found investors, which included Plaintiffs. Defendants then closed on the purchase of the Property from Highwoods. The purchase from Highwoods was funded in great part with money collected from Plaintiffs and lender financing. Per the assignment provision in the purchase contract between Defendants and Highwoods, Defendants instructed Highwoods to convey the Property at closing directly to a number of entities, including Plaintiffs, as tenants-in-common.

Several months later, in late 2007, Duke informed Defendants that it would not be renewing most of its leases. And in 2010, Duke moved out of the majority of its space in the Property, causing cash flow issues for Defendants and Plaintiffs.

As the cash flow issues progressed, Plaintiffs sought to have Defendants replaced as the property managers. Defendants resisted. But on 25 March 2010, Plaintiffs and Defendants entered the Settlement Agreement, whereby Defendants agreed to step aside as the Property managers and whereby Plaintiffs agreed to release claims that it may have against Defendants.

In 2012, the Property continued to struggle producing sufficient cash flow, which resulted in a default of the loan. The lender foreclosed, and the Property was sold to a third party at foreclosure at a loss to Plaintiffs.

Plaintiffs commenced this action against Defendants. In a separate action, Plaintiffs sought damages from Highwoods and Highwoods' broker. In both actions, Plaintiffs allege that Defendants and Highwoods separately failed to make certain disclosures around the time of the

1. For purposes of clarity, I refer to Defendants collectively throughout this opinion, though they each played different roles. For instance, one contracted with Highwoods to purchase the Property, another acted as a broker who solicited investors, and another served as the Property's manager. However, because of our resolution of this matter, it is not important to go into greater detail of what *each* Defendant's role was in the matter.

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purchase in 2007 regarding Duke's activities which tended to lessen the likelihood that Duke would seek to renew its leases in 2010. The trial court entered orders dismissing some of the claims against Defendants in this action and all of the claims against Highwoods in the other action.

In 2017, both matters were brought up on appeal to our Court. The appeal of the trial court's dismissal of Plaintiffs' claims against Highwoods is addressed in a separate opinion.

This present appeal addresses the trial court's decision to dismiss most, but not all, of Plaintiffs' claims against Defendants. Plaintiffs appealed, and Defendants cross-appealed.

III. Appellate Jurisdiction

Before addressing the merits, we must first consider our appellate jurisdiction since this appeal is interlocutory in nature. While the trial court has disposed of *most* of the claims asserted by Plaintiffs, it denied Defendants' request to dismiss claims brought under North Carolina securities law by the five Plaintiffs domiciled in North Carolina (the "NC Securities Claims").

Generally, we do not have jurisdiction to consider an appeal from an interlocutory order unless the appellant meets its burden of demonstrating to our Court how the order appealed from affects a substantial right or that the order has been properly certified for immediate appeal by the trial court pursuant to Rule 54(b) of our Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1-277; N.C. Gen. Stat. § 1A-1, Rule 54(b). Otherwise, we generally do not have jurisdiction unless we choose in our discretion to grant a petition for a writ of *certiorari*.

Here, no party has made any argument that a substantial right has been affected. The trial court has properly certified for immediate review all of the claims that were dismissed, but the trial court did not certify for immediate review the NC Securities Claims, which were not dismissed. Therefore, based on the trial court's Rule 54 certification, we have appellate jurisdiction only over the claims that were dismissed, but not over the NC Securities Claims.

We note that no party has filed a petition requesting that we grant a writ of *certiorari* to review the NC Securities Claims. On our motion, however, we hereby issue a writ of *certiorari* "to aid in our own jurisdiction" to consider Plaintiffs' NC Securities Claims as well. N.C. Gen. Stat. § 7-27(c) (General Assembly granting to the Court of Appeals jurisdiction "to issue prerogative writs . . . in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts"). We

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do so in the interests of judicial economy as our legal reasoning which resolves the other claims and also resolves the NC Securities Claims.

IV. Analysis

Having determined that we have jurisdiction over this appeal, we address the merits.

The trial court dismissed most of Plaintiffs' claims, but *not* based on the Settlement Agreement in which Plaintiffs purportedly agreed to release Defendants from all claims related to the Property. Regarding the Settlement Agreement, the trial court expressly held that the Settlement Agreement did not bar Plaintiffs from pursuing the remaining claims against Defendants. Based on Section 2.4 of the Settlement Agreement, which is discussed below, we conclude that *all* of Plaintiffs claims against Defendants should have been dismissed.

In March 2010, Plaintiffs and Defendants entered into the Settlement Agreement, whereby Defendants agreed to step aside without a fight if Plaintiffs agreed to release Defendants from any potential claims relating to the Property. The obligations in the Settlement Agreement, however, were not instantaneous, but the Agreement allowed Plaintiffs a due diligence period, until 2 July 2010, to decide whether they were willing to release Defendants from all claims. Specifically, Section 2.4 of the Settlement Agreement provided (1) that Plaintiffs had until 2 July 2010 to "assert" any claims that it wished to exclude from the operation of the release; (2) that if Plaintiffs elected to retain the right to assert certain claims, then Defendants could elect to back out of their promise to resign as Property managers; and (3) that if Plaintiffs did not duly assert any claims by 2 July 2010, then all potential claims of Plaintiffs against Defendants would be released, and Defendants would be obligated to complete the steps necessary to step aside as Property managers.

On 1 July 2010, the day prior to Plaintiffs' deadline under Section 2.4 to assert claims, Plaintiffs commenced this action by filing a Summons with the trial court pursuant to Rule 3 of our Rules of Civil Procedure, which allowed Plaintiffs an additional 20 days to file their complaint.² In their Summons, Plaintiffs described the nature of the claims they planned to assert in their complaint.

Importantly, though, Plaintiffs did not notify Defendants of the Summons or otherwise of their intent to assert claims by the 2 July 2010

2. Rule 3 allows a party to commence an action by filing a summons and requesting permission to file the complaint within 20 days. N.C. Gen. Stat. § 1A-1, Rule 3.

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deadline. Rather, based on the record and the findings of the trial court, Defendants did not become aware of Plaintiffs' intention until they received a copy of the Summons on 12 July 2010, which Plaintiffs had mailed five days earlier on 7 July 2010.

The issue raised in this appeal is whether Plaintiffs properly "asserted" claims under Section 2.4 of the Settlement Agreement by simply commencing the action by 2 July 2010 *or* whether under Section 2.4 Plaintiffs were required also to notify Defendants of their intent by 2 July 2010 to exclude claims they wished to assert from the operation of the release. The language of Section 2.4 states as follows:

It is acknowledged that the release provisions contained in Paragraph 2.1 and 2.2 are subject to and conditioned upon the absence of any claims by [Plaintiffs] asserted against [Defendants] prior to July 2, 2010[.] [Plaintiffs] shall have until [July 2, 2010] to conduct such inquiries and investigations as they may determine to be necessary and appropriate . . . to determine whether or not they have a viable claim against [Defendants].

Should [Plaintiffs] discover such a claim, they shall give written notice to [Defendants] of such claim (an "Excluded Claim") prior to [July 2, 2010], including the description of the basis of such claim in reasonable detail,

and

they shall commence an action or arbitration proceeding with regard to such Excluded Claim prior to [July 2, 2010].

Should [Plaintiffs] duly and timely assert an Excluded Claim prior to [July 2, 2010] . . . the [release] shall be void and of no force and effect with respect to the Excluded Claim . . . [.]³

Plaintiffs argued to the trial court (and argue here on appeal) that Plaintiffs met their contractual obligations "to assert an Excluded Claim" under the Settlement Agreement simply by filing the Summons which commenced this action by 2 July 2010, without providing any notice by 2 July 2010 to Defendants. Defendants argued to the trial court (and argue here on appeal) that Plaintiffs could only properly "assert" a claim

3. This paragraph in the actual Settlement Agreement is a single block paragraph. It is broken up in this opinion for ease of reading.

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by *both* commencing their action *and* notifying Defendants in writing of their intent to exclude claims from the reach of the release.

The trial court concluded that Section 2.4 was ambiguous and, therefore, that the provision should be read “restrictively” against Defendants, such that Section 2.4 “effectively precluded the release from becoming effective once Plaintiffs initiated their action on July 1, 2010,” notwithstanding that Plaintiffs did not give Defendants any notice until after 2 July 2010.

In reviewing the trial court’s interpretation, we are mindful of a court’s role in construing contract language:

Interpreting a contract requires the court to examine the language of the contract itself for indications of the parties’ intent at the moment of execution. If the plain language is clear, the intention of the parties is inferred from the words of the contract. Intent is derived not from a particular contractual term but from the contract as a whole.

State v. Philip Morris, 363 N.C. 623, 631-32, 685 S.E.2d 85, 90 (2009) (citations omitted).

We have reviewed Section 2.4 in context with the entire agreement, and we disagree with the trial court’s interpretation that Section 2.4 did not require Plaintiffs to notify Defendants of their intent to exclude claims by the 2 July 2010 deadline. Reading the contract as a whole, based on its plain language, we conclude that the parties intended that Plaintiffs were required *both* to file their action *and* separately to notify Defendants of such claims, all by the 2 July 2010 deadline, to preserve any claims that they did not want to release. Each requirement served different purposes.

Under the terms of the Settlement Agreement, Plaintiffs were required to file their action by 2 July 2010 to avoid any claim from being barred by the applicable statute of limitations. That is, under another provision of the Settlement Agreement, Defendants agreed that all applicable statute of limitations with respect to any potential claims would be tolled from the date of the agreement in March 2010 until 2 July 2010, while Plaintiffs conducted their due diligence. The requirement that a lawsuit be filed clarified that statutes of limitations would be tolled indefinitely for any claims which Plaintiffs wished to assert, but that they would only be tolled until 2 July 2010.

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The “notice” requirement – that Plaintiffs provide actual notice to Defendants of any claims by 2 July 2010 – served a different purpose. Specifically, the Settlement Agreement contemplated that during Plaintiffs’ due diligence period, Defendants would allow Plaintiffs’ chosen Property manager to manage the Property on a subcontract basis and that Defendants would also work with Plaintiffs in obtaining the required lender approval for the change in management. The last portion of Section 2.4 of the Settlement Agreement provided that Defendants would have the right to cease these efforts and terminate the subcontracts with Plaintiffs’ chosen manager *if* Plaintiffs elected to assert claims. If Plaintiffs were not required to give notice by 2 July 2010 that they intended not to release Defendants from all claims, then the provision in Section 2.4 relieving Defendants of their obligation under the Settlement Agreement to step aside as Property managers in such case could be rendered meaningless; Defendants could not enforce this right unless they knew Plaintiffs had decided not to grant a full release. As described below, under Plaintiffs’ interpretation, Plaintiffs could have withheld notice for many months until after Defendants had completed the process of stepping aside as Property managers.

But first, we note that a plain reading of Section 2.4, when read in context of the whole Settlement Agreement, supports our interpretation. This Section describes 2 July 2010 as the “Effective Date of Release,” at which time Plaintiffs’ release of all potential claims against Defendants would become effective under the Settlement Agreement.

The first sentence of Section 2.4 states that the release would be effective unless Plaintiffs “asserted” claims against Defendants by “2 July 2010 (the “Effective Date of Release”).”

The second sentence states that Plaintiffs would be allowed to conduct due diligence until the Effective Date of Release to determine if they wanted to assert claims.

The third sentence is the key sentence, which states *how* Plaintiffs were required to “assert” claims that they wished to exclude from the operation of the full release. This third sentence is a single compound sentence and required that Plaintiffs “shall give written notice to [Defendants] prior to the Effective Date of Release, and they shall commence an action or arbitration [] prior to the Effective Date of Release.”

The fourth sentence then states that “[s]hould [Plaintiffs] duly and timely assert an Excluded Claim prior to the Effective Date of Release[,]” then the provisions of the full release “shall be void and of no force and

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effect with respect to the Excluded Claim” and further Defendants could cancel the subcontracts with Plaintiffs’ chosen Property manager.

In sum, we conclude that a plain reading of this Section required that to “duly and timely assert” a claim, Plaintiffs had to notify Defendants *and* file their action by 2 July 2010.

Based on Plaintiffs’ (and the trial court’s) interpretation of Section 2.4 – where Plaintiffs could duly “assert” a claim by simply commencing an action without otherwise notifying Defendants by 2 July 2010 – Plaintiffs could have waited until Defendants had stepped aside as Property managers to notify Defendants of this lawsuit. For instance, under Plaintiffs’ and the trial court’s interpretation, Plaintiff could have waited until 22 July 2010 to file their Complaint (pursuant to the 20-day extension provided in Rule 3). And then Plaintiffs could have waited *at least* until September 2010 to serve their Summons/Complaint on Defendants. In fact, by taking advantage of Rule 4(d) of our Rules of Civil Procedure, Plaintiffs could have kept Defendants in the dark about their intentions well into 2011 by extending the Summons or suing out successive alias and pluries summonses. In other words, based on Plaintiffs’ interpretation, it would have been possible that Defendants have completed their agreement to fully step aside as Property managers and that Plaintiffs’ chosen manager would have fully been in place as manager without Defendants ever having any knowledge that Plaintiffs still intended to assert claims against them.

It may be argued that time was not of the essence with regard to the 2 July 2010 deadline. In other words, if time was not of the essence with respect to the 2 July 2010 date, Plaintiffs had a reasonable time after 2 July 2010 to provide the written notice to Defendants. However, Plaintiffs failed to make any such argument either to the trial court or on appeal to our Court. Therefore, any argument that time was not of the essence is waived. N.C. R. App. P. 28.

But assuming that the argument was preserved, we believe that time *was* of the essence and 2 July 2010 was a hard deadline. Section 2.4 of the Settlement Agreement, which essentially provided Plaintiffs with a unilateral option to exclude claims from the reach of the release, is similar to an option contract to purchase real estate. In an option contract, the potential buyer pays consideration for the “option,” but not the obligation, to purchase certain real estate at a specified price if exercised by a specified date. And our Supreme Court has stated that time is automatically of the essence as to the option date in such contracts. *See Ferguson v. Phillips*, 268 N.C. 353, 355, 150 S.E.2d 518,

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520 (1966) (“Options being unilateral in their inception are construed strictly in favor of the maker, because the other party is not bound to performance[.]”). Similarly, under the Settlement Agreement, Plaintiffs were given the unilateral option to back out of its obligation to release Defendants from all claims. They could simply notify Defendants that they did not want to release claims. Defendants, on the other hand, did not have the option to back out unilaterally. Rather, they could only do so if Plaintiffs first decided to back out.

Additionally, we believe that the Settlement Agreement, when read as a whole, otherwise suggests that the parties intended for 2 July 2010 to be of the essence. Specifically, the Settlement Agreement provided that the statutes of limitations regarding any potential claims would not be tolled beyond 2 July 2010. And, as our Supreme Court has recognized, “[s]tatutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of [a] plaintiff’s cause of action.” *Pearce v. N.C. Highway*, 310 N.C. 445, 451, 312 S.E.2d 421, 425 (1984).

We note Plaintiffs’ brief contains an argument that Defendants waived the “notice” requirement contained in Section 2.4 of the Settlement Agreement based on Defendants’ “previous position that their own obligations under the Settlement Agreement had been voided under this same language in Section 2.4.” In support of their argument, Plaintiffs cite to statements made by an employee during the course of this litigation and quote *McDonald v. Medford*, 111 N.C. App. 643, 648, 433 S.E.2d 231, ___ (1993) that “[w]here parties, through their actions, have placed a practical interpretation on their contract after executing it, the courts will ordinarily give it that construction[.]” However, Plaintiffs do not state what “actions” Defendants took to indicate that they were voiding their obligations under Section 2.4. They do not point to anything in the record which suggests that Defendants attempted to step back in as Property managers once they became aware of this lawsuit. And the trial court did not make any findings to that effect. On the contrary, in their Answer, Defendants expressly assert that all Plaintiffs’ claims had been settled and released by virtue of the Settlement Agreement. Accordingly, we conclude that Plaintiffs have failed to demonstrate from the record that a genuine issue of material fact exists that Defendants waived the notice provision contained in Section 2.4 of the Settlement Agreement.

V. Conclusion

We conclude that all of Plaintiffs claims against Defendants concerning the Property are barred by operation of the Settlement Agreement.

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The trial court, though, only granted Defendants' motion for summary judgment in part, allowing the NC Securities Claims to proceed. Therefore, we affirm in part and reverse in part the trial court's order. We remand that matter to the trial court with instructions to enter judgment in favor of Defendants on all claims asserted by Plaintiffs.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Judges BRYANT and TYSON concur.

NNN DURHAM OFFICE PORTFOLIO 1, LLC; ET AL., PLAINTIFFS

v.

HIGHWOODS REALTY LIMITED PARTNERSHIP; HIGHWOODS DLF 98/29, LLC;
HIGHWOODS DLF, LLC; HIGHWOODS PROPERTIES, INC.; GRUBB & ELLIS /THOMAS
LINDERMAN GRAHAM; AND THOMAS LINDERMAN GRAHAM INC., DEFENDANTS

No. COA17-756

Filed 4 September 2018

1. Real Property—Securities Act—primary liability claims—sufficiency of claims

In a complex business case involving the sale of tenant-in-common (TIC) like-kind interests in multiple parcels of real property, the business court did not err in dismissing plaintiff purchasers' primary liability claims asserted against the seller and broker (defendants) under the Securities Act because the transfer of the real property deed did not constitute the sale of a security. The TIC interests were created, offered, and sold to plaintiffs from a third-party entity, which provided the investment materials plaintiffs relied on. Plaintiffs did not state a proper claim under the Act because they did not allege that defendants solicited plaintiffs or promoted the sale of TIC interests in order to sell them securities.

2. Real Property—Securities Act—secondary liability claims—N.C.G.S. § 78A-56(c)—material aid

In a complex business case involving the sale of tenant-in-common like-kind interests in multiple parcels of real property, the business court did not err in granting summary judgment for a seller and broker (defendants) on plaintiff purchasers' secondary liability claims under section 78A-56(c) of the Securities Act after determining that defendants did not materially aid a third-party

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investment company's presentation of facts regarding the properties in its private-placement memorandum (PPM) which plaintiffs relied on when deciding to purchase. No argument was made or evidence presented to indicate that defendants owed a duty to make any disclosures directly to plaintiffs, nor was there proof that defendants actually knew of any alleged misrepresentations in the PPM.

3. Fraud—common law—real property transaction—justifiable reliance

In a complex business case involving the sale of tenant-in-common like-kind interests in multiple parcels of real property, the business court did not err in dismissing plaintiff purchasers' common law claims asserted against the seller and broker (defendants) for common law fraud, fraud in the inducement, or negligent misrepresentation because plaintiffs' theory of indirect reliance was not sufficient to meet the element that they justifiably relied on defendants' misrepresentations which were passed through a third-party investment company. Plaintiffs could not transfer reliance that the third-party investment company placed on defendants' confidential offering memorandum (COM) to plaintiffs' own reliance on the private-placement memorandum drafted by the third party, where the two memoranda contained different lease renewal probabilities affecting the analysis of cash flow projections from the properties' commercial tenants, undermining plaintiffs' claims, and there was no allegation or evidence that any of the plaintiffs saw the COM itself.

Appeal by plaintiffs from orders entered 19 February 2013, 7 December 2016, and 3 January 2017 by Chief Business Court Judge James L. Gale in Durham County Superior Court. Heard in the Court of Appeals 6 March 2018.

Stark Law Group, PLLC, by Thomas H. Stark and Seth A. Neyhart, and Penry Riemann, PLLC, by Andy Penry, for plaintiff-appellants.

Ellis & Winters LLP, by Jonathan D. Sasser, Jeremy M. Falcone, James M. Weiss, and Emily E. Erixson, for defendant-appellees Highwoods Realty Limited Partnership; Highwoods DLF 98/29, LLC; and Highwoods Properties, Inc.

Manning, Fulton & Skinner, P.A., by Michael T. Medford and J. Whitfield Gibson, for defendant-appellees Thomas Linderman Graham, Inc. and Grubb & Ellis/Thomas Linderman Graham.

NNN DURHAM OFFICE PORTFOLIO 1, LLC v. HIGHWOODS REALTY LTD. P'SHIP

[261 N.C. App. 185 (2018)]

North Carolina Department of Secretary of State, by Enforcement Attorney Colin M. Miller, for amici curiae, the North Carolina Secretary of State and the North American Securities Administration Association, Inc.

TYSON, Judge.

Plaintiffs appeal from orders granting (1) Defendants' motions to dismiss, except for denial of Defendants' motion to dismiss Plaintiffs' claim of secondary liability under the North Carolina Securities Act; (2) Defendants' motions for judgment on the pleadings; and, (3) Defendants' motions for summary judgment.

I. Background

A. Factual Background

Plaintiffs, NNN Durham Office Portfolio 1, LLC, et al., are purchasers of tenant-in-common ("TIC") interests in five parcels of real property located in Durham, North Carolina (the "Property"). Plaintiff LLCs are all Delaware limited liability companies, which are registered with the North Carolina Secretary of State. Plaintiffs include the individual purchasers and LLCs formed by the individuals for the purpose of purchasing their TIC real property interests and through which these interests were purchased. Only three Plaintiff TIC owners are North Carolina residents (the "North Carolina Plaintiffs").

The Property consists of tracts of real property improved with five medical office and clinic buildings owned at relevant times by Defendant Highwoods DLF 98/29, LLC, a Delaware-chartered corporation with its principal place of business in Raleigh, North Carolina, and the successor-in-interest to the seller of the Property, Highwoods DLF 98/29, L.P. Defendant Highwoods DLF, LLC, a Delaware LLC, was the sole general partner of Highwoods DLF 98/29, L.P. (collectively, "Highwoods").

In 2006, the Property's two primary tenants were Duke Pediatrics and Duke's Patient Revenue Management Organization ("Duke PRMO"), both of which are affiliated with Duke University Health System, Inc. (collectively, "Duke"). Duke PRMO occupied over 54% of rentable space in the Property, including a sublease with Qualex, Inc. Duke PRMO's sublease term was due to expire in February 2009, and its term of leases in the other two buildings were scheduled to expire in June 2010.

In the spring of 2006, Highwoods approached Defendant Thomas Linderman Graham Inc. ("TLG"), a North Carolina-based commercial

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real estate company, which conducted business under the trade name Grubb & Ellis | Thomas Linderman Graham, about selling the Property. Highwoods and TLG entered into an exclusive listing agreement on 24 October 2006 for TLG to analyze, market, and broker a sale of the Property. TLG prepared a Confidential Offering Memorandum (“COM”), dated 6 December 2006, for prospective buyers of the Property. The COM disclosed that the terms of the leases for the Property’s tenants were set to expire in 2009 and 2010 and contained no renewal options. The COM also contained a series of “renewal probabilities” for each of the current tenants, including Duke PRMO. The COM’s terms provided that the information contained therein was “being provided solely to facilitate the Prospective Purchaser’s own due diligence for which it shall be fully and solely responsible.”

In April 2006, TLG representative Jim McMillan settled on a “fairly conservative” projected valuation for the Property of between \$30.2 to \$31.3 million, recognizing that “[a]ll in all, a big part of th[e] sale will be the environment the properties sit in and the likelihood an[] investor believes Duke is there for the long run.”

In September 2006, Duke PRMO began considering a possible relocation from the Property and retained Corporate Realty Advisors to help solicit bids to build a new Duke PRMO facility. On or about 12 September 2006, Highwoods’ parent company, Highwoods Properties, Inc., made an informal proposal for a build-to-suit building for Duke PRMO to be ready by July 2008. Discussions occurred between Highwoods and Duke PRMO’s broker about possible relocation out of the Property. In October 2006, Duke PRMO issued a request for proposals (“RFP”) for a build-to-suit replacement building.

On 6 December 2006, Highwoods Properties, Inc. formally submitted to Duke a proposal to build a new facility for Duke PRMO. The COM did not disclose any information about Duke PRMO’s RFPs for a build-to-suit building or Highwoods Properties’ proposal.

On 21 December 2006, Triple Net Properties, LLC (“Triple Net”) submitted the winning bid of \$34.2 million to TLG for the purchase of the Property. Triple Net’s final bid indicated its intention to purchase the Property with money raised through a TIC like-kind investment structure pursuant to Section 1031 of the Internal Revenue Code. *See* 26 U.S.C. § 1031 (2018).

The day before submitting its final bid, Triple Net emailed McMillan, and asked why Duke had not yet renegotiated its leases and for assurance

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of Duke's continued leasing of the Property. McMillan responded that day, stating there was no known reason why Duke had not been negotiating new leases. McMillan also stated that the "location works very well for [Duke] and they are well entrenched there," Duke had been expanding into its current buildings, and no other location in the area could accommodate Duke's needs.

The next day, on 22 December 2006, McMillan informed Triple Net that Highwoods had chosen Triple Net as the purchaser.

On 5 January 2007, Triple Net prepared a private-placement memorandum ("PPM") and other offering materials for prospective investors in order to sell TIC interests to Section 1031 like-kind exchange buyers. The PPM disclosed the objectives, risks, and terms associated with investing in the Property and included various proposed controlling agreements, including a TIC Agreement and Management Agreement (collectively, "the Agreements").

The PPM stated that to participate in the investment, each investor was required to complete a TIC purchaser questionnaire, which cautioned them to carefully read the PPM. The PPM contained eighteen pages of risk factors, specifically including disclosures and warnings that the Property carried a large dependence on one tenant, Duke, and the expiration dates and terms of Duke's leases.

Under the risk factor "Large Dependence on One Tenant," the PPM explained that "[a]ny large-scale departure by Duke [from the Property] would significantly affect the cash flow and fair market value of the Property" and without Duke, the income would not cover the loan payments, the lender could foreclose, and investors could suffer a complete loss of their investment. The Risk Factors also included a statement that "[u]nless extended, leases with all of the tenants, representing 100% of the Property, will expire within the next 3 calendar years." (Emphasis original).

Between 9 January 2007, when Highwoods provided the due diligence materials, and 24 January 2007, when the final purchase agreement was executed, Triple Net continued its due diligence efforts. During that time, Triple Net secured a due diligence report and an independent property appraisal and interviewed the Property's tenants, including Duke's representative Scott Selig.

On 19 January 2007, a meeting was held between Mike Waddell of Triple Net, Selig of Duke, and Charles Ostendorf and David Linder, both of Highwoods. After the meeting, Ostendorf took Waddell on a tour of

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the Property. Afterwards, Ostendorf stated he did not envision Duke would move if they were provided a “very economical long term deal.”

On 24 January 2007, Triple Net and Highwoods executed the Purchase Sale Agreement for the Property. By 12 March 2007, Triple Net had recruited a group of TIC like-kind exchange investors to invest in the Property. The sale closed on 12 March 2007, and a deed was recorded in Durham County Registry conveying title of the Property from Defendant Highwoods DLF 98/29, L.P. to Plaintiffs and other entities as tenants-in-common.

In November 2007, Duke announced its decision not to renew Duke PRMO's leases beyond their expiration date in June 2010. Duke PRMO vacated the Property on 12 December 2008. Duke Pediatrics renewed its lease for another seven years and remains a tenant at the Property.

In April 2011, the lender initiated foreclosure proceedings on the Property. In October 2011, the Property was sold by upset bid at a public foreclosure sale, and on 20 December 2011, it was conveyed to the highest bidder.

B. Procedural Background

Plaintiffs initially filed a complaint against Defendants Highwoods and TLG on 1 April 2010, but voluntarily dismissed that action without prejudice on 6 July 2011 after the case had been designated a mandatory complex business case by the Chief Justice of North Carolina. On 6 July 2012, Plaintiffs filed their present complaint. On 19 February 2013, the Business Court granted Defendants' motions to dismiss Plaintiffs' claims of fraud, fraud in the inducement, unfair and deceptive trade practices, negligent misrepresentation, and punitive damages, but denied Defendants' motions to dismiss Plaintiffs' claims of secondary liability under N.C. Gen. Stat. § 78A-56(c)(2) of the North Carolina Securities Act and conspiracy to violate that Act (“February 2013 order”).

On 15 November 2013, Highwoods moved for partial summary judgment on the question of whether the TICs' investments in the Property qualified as a sale of securities under the Securities Act. The Business Court deferred ruling on that motion until discovery had concluded.

On 29 May 2015, Defendants filed Rule 12(c) motions for judgment on the pleadings concerning the claims of the fifty-five out-of-state Plaintiffs on the grounds that those Plaintiffs had not alleged they had received or accepted an offer to sell a security in North Carolina, and cannot recover under the North Carolina Securities Act.

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The parties filed cross-motions for summary judgment on 17 August 2015. Defendants filed motions for summary judgment on all remaining claims pending against them. Plaintiffs moved for partial summary judgment on their claim of secondary liability under the Securities Act. Also on 17 August 2015, Plaintiffs filed a North Carolina Rules of Civil Procedure, Rule 54(b) motion seeking the Business Court to modify its February 2013 order to reinstate Plaintiffs' punitive damages claim.

C. The Business Court's Orders

The Business Court held a joint hearing on the summary judgment motions and on Plaintiffs' Rule 54(b) motion on 23 November 2015. On 5 December 2016, the Business Court entered an Order and Opinion ("5 December 2016 order"). On 21 December 2016, Plaintiffs filed a motion pursuant to Rule 54 to certify the Business Court's order as a final judgment in this case. On 29 December 2016, the Business Court issued its Revised Order & Opinion and Final Judgment ("29 December 2016 revised order"). The 29 December 2016 revised order varies from the 5 December 2016 order only insofar as it certifies the revised order as a final judgment pursuant to Rule 54(b).

In pertinent part, the 29 December 2016 revised order granted Defendants' Rule 12(c) motions, denied Plaintiffs' motion for partial summary judgment against Defendants for primary liability under N.C. Gen. Stat. § 78A-56(a), and granted summary judgment to Defendants on Plaintiffs' secondary liability claims under N.C. Gen. Stat. § 78A-56(c).

On 30 December 2016, Plaintiffs filed timely notice of appeal from the February 2013 order, the 5 December 2016 order, and the 29 December 2016 revised order.

II. Jurisdiction

Appeal lies of right in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) (2013) and 1-277 (2017). This case was designated a complex business case on 11 July 2012, prior to the effective date of the 2014 amendments designating a right of appeal from a final judgment of the Business Court directly to the Supreme Court of North Carolina. *See* 2014 N.C. Sess. Laws 621, ch. 102, § 1.

III. Issues

Plaintiffs argue the Business Court erred by (1) granting Defendants' motion for judgment on the pleadings against out-of-state Plaintiffs under N.C. Gen. Stat. § 78A-63(a); (2) dismissing Plaintiffs' claims against Defendants for primary liability under N.C. Gen. Stat. § 78A-56(a);

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(3) granting summary judgment to Defendants on Plaintiffs' secondary liability claims under N.C. Gen. Stat. § 78A-56(c); and (4) dismissing Plaintiffs' common law claims.

In their brief, Plaintiffs also argue the Business Court erred in dismissing their other North Carolina Securities Act claims pursuant to sections 78A-12(a)(5) and 78A-56(b1). However, Plaintiffs acknowledge that the Business Court "did not address Defendants' civil liability under N.C. Gen. Stat. § 78A-12." The Business Court stated it was dismissing all Plaintiffs' claims under the Securities Act, other than Plaintiffs' claims under N.C. Gen. Stat. § 78A-56(c)(2). Plaintiffs assert they raised the issue on summary judgment and requested the Business Court reconsider it pursuant to Rule 54(b). Plaintiffs' Rule 54(b) motion was denied as moot. As a result, this question is not properly before this Court, and we need not address it.

IV. Standards of Review

Plaintiffs appeal from the Business Court's partial grant of summary judgment in favor of Defendants, grant of certain of Defendants' 12(b)(6) motions to dismiss, and grant of Defendant's motions for judgment on the pleadings.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003) (citation and internal quotation marks omitted), *aff'd per curiam*, 358 N.C. 137, 591 S.E.2d 520 (2004).

"Judgment on the pleadings, pursuant to Rule 12(c), is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Builders Mut. Ins. Co. v. Glascarr Props., Inc.*, 202 N.C. App. 323, 324, 688 S.E.2d 508, 510 (2010) (quoting

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Groves v. Cmty. Hous. Corp., 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001)). “In deciding such a motion, the trial court looks solely to the pleadings. The trial court can only consider facts properly pleaded and documents referred to or attached to the pleadings.” *Id.* at 324-25, 688 S.E.2d at 510 (quoting *Reese v. Mecklenburg Cty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 37-38 (2009)). “This Court reviews *de novo* a trial court’s ruling on motions for judgment on the pleadings.” *Id.* at 325, 688 S.E.2d at 510 (quoting *Reese*, 200 N.C. App. at 497, 685 S.E.2d at 38).

“The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief must be granted.” *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted).

V. Analysis*A. Plaintiffs’ Claims Under N.C.G.S. §78A-56(a)*

[1] Plaintiffs argue the Business Court erred by dismissing Plaintiffs’ primary liability claims under N.C. Gen. Stat. § 78A-56(a) against Defendants. We disagree.

The Business Court found primary liability is imposed upon a person or entity who sells or offers for sale a security. Plaintiffs did not allege Defendants solicited Plaintiffs in order to offer or sell them securities. Further, any privity between Defendants and Plaintiffs resulting from the transfer of real property interests by deed does not create any liability for Defendants as purported sellers of securities. As the Business Court concluded, “The critical fact is not Highwoods’ transferring the fractional real estate interests to Plaintiffs, but instead is Plaintiffs’ entrusting those fractional interests to Triple Net in exchange for investment returns.”

We agree with the Business Court’s reasoning and conclusion that Plaintiffs have not stated a claim of primary liability under the North Carolina Securities Act against Defendants. Without more, i.e., soliciting Plaintiffs or promoting the sale of TIC interests, Defendants cannot automatically or statutorily be deemed to be sellers of securities simply as a result of Highwoods’ deeding the real property to them. Triple Net requested and assigned its contract with Highwoods for it to deed the property directly to Plaintiffs. Plaintiffs cannot establish liability, even if all parties, including Defendants, knew or should have known that Triple Net as buyer was a syndicator and that the fractional interests

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Highwoods deeded to Plaintiffs would be entrusted to Triple Net in exchange for investment returns. *Cf. S.E.C. v. Apuzzo*, 689 F.3d 204, 214 (2d Cir. 2012) (concluding the complaint plausibly alleged that the defendant provided substantial assistance to the primary violator under the federal securities law by agreeing to participate in the transactions at issue, negotiating the details of the transactions, and, *inter alia*, approving or knowing about the issuance of inflated invoices).

Highwoods' sole interaction with Plaintiffs was to deed the TIC interests in the real property to them at Triple Net's request and assignment. "The principle function of a deed is to evidence the transfer of a particular interest in land . . ." *Strange v. Sink*, 27 N.C. App. 113, 115-16, 218 S.E.2d 196, 198 (1975). When a deed fulfills all the provisions of the contract, the executed contract then merges into the deed. *Biggers v. Evangelist*, 71 N.C. App. 35, 38, 321 S.E.2d 524, 526 (1984) (citations omitted). This deed transfer by Highwoods and recordation was a sale of real property and did not constitute the sale of a security.

Triple Net created, offered, and sold the TIC interests to Plaintiffs. Triple Net drafted the PPM, which contained the alleged misrepresentations and omissions upon which Plaintiffs based their securities law claims, without the participation of Defendants. The Business Court correctly granted Defendants Highwoods and TLG's motion to dismiss Plaintiffs' primary liability claims under the North Carolina Securities Act. Plaintiff's arguments are overruled.

B. Summary Judgment to Defendants on Secondary Liability Claims

[2] Plaintiffs contend the Business Court erred by granting summary judgment to Defendants on Plaintiffs' secondary liability claims under N.C. Gen. Stat. § 78A-56(c). Plaintiffs argue the Business Court's narrow construction of the term "material aid" under section 78A-56(c)(2) is an error of law, and that at the very least, Plaintiffs' evidence tends to show material issues of fact exist. We disagree.

The Securities Act imposes two essential elements for secondary liability: (1) the "material aid" requirement, and (2) the "actual knowledge" requirement. N.C. Gen. Stat. § 78A-56(c)(2) (2017). In construing the material aid requirement, the Business Court in its 19 February 2013 order concluded:

{78} There is no case law in North Carolina construing the concept of aiding and abetting a securities violation. In fact, there is limited North Carolina law examining aider and abettor liability in any civil context. North Carolina

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has at least in some instances adopted the Restatement (Second) of Torts § 876, which incorporates the “substantial assistance” standard. *See Tong v. Dunn*, 2012 NCBC LEXIS 16, at *26 n.3 (N.C. Super. Ct., Mar. 19, 2012); RESTATEMENT (SECOND) OF TORTS § 876 (1979). However, the North Carolina Court of Appeals has indicated that § 876 should be applied restrictively, and that aiding and abetting is considered in the nature of inciting conduct or taking concerted action. *Hinson v. Jarvis*, 190 N.C. App. 607, 611-13, 660 S.E.2d 604, 608 (2008). This court has stated that if a claim for aiding and abetting a breach of fiduciary duty exists at all, it will require proof that the “aiding and abetting party [] have the same level of culpability or scienter” as the primary tort-feasor. *Tong*, 2012 NCBC LEXIS 16, at *26 (citing *Sompo Japan Ins. Inc. v. Deloitte & Touche, LLP*, 2005 NCBC LEXIS 1, at *12 (N.C. Super Ct., June 10, 2005)).

Since that order was entered, only one case has dealt with the issue of aiding and abetting a securities violation, *Piazza v. Kirkbride*, 246 N.C. App. 576, 785 S.E.2d 695, *disc. review allowed*, 369 N.C. 37, 794 S.E.2d 316 (2016), and the Court only elaborated on the burden a plaintiff bears in proving secondary liability:

The first subsection, N.C. Gen. Stat. § 78A-56(a), imposes primary liability on “any person” who offers or sells a security. If primary liability exists, then secondary liability may be imposed upon “control persons,” enumerated in N.C. Gen. Stat. § 78A-56(c)(1), or upon persons not included in section 78A-56(c)(1) who “materially aid[]” in the transaction basing primary liability. N.C. Gen. Stat. § 78A-56(c)(2). The secondarily liable parties are “jointly and severally” liable “to the same extent” as the primarily liable person. N.C. Gen. Stat. § 78A-56(c)(1)-(2). *This differentiation matters because a plaintiff bears a higher burden of proof in proving secondary liability for a person outside of section 78A-56(c)(1) who “materially aids” in the transaction.*

246 N.C. App. at 597-98, 785 S.E.2d at 709 (emphasis supplied).

In its 29 December 2016 revised judgment and order, the Business Court relied upon its earlier order in analyzing the “material aid” requirement and concluded that Highwoods’ mere transfer of a real property interest by deed alone did not constitute “material aid” within the scope

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of the Securities Act. The Business Court also concluded that “the evidence of record, viewed in the light most favorable to Plaintiffs, does not allow for a conclusion that either Highwoods or TLG knew of and then materially aided or substantially assisted in Triple Net’s expression of the opinion upon which the North Carolina Plaintiffs base their primary-liability claim.”

Under federal securities law, the United States Court of Appeals for the Fourth Circuit has noted that “[a]bsent a [defendant’s] duty to disclose, allegations that a defendant knew of the wrongdoing and did not act fail to state an aiding and abetting claim.” *Schatz v. Rosenberg*, 943 F.2d 485, 496 (4th Cir. 1991) (citations omitted). In other words, pursuant to the provision of the federal securities law comparable to N.C. Gen. Stat. § 78A-56(c)(2), absent a duty that Highwoods and TLG owed to Plaintiffs, any allegations that Highwoods and TLG purportedly knew of any wrongdoing perpetrated by Triple Net, but failed to act to inform Plaintiffs of that wrongdoing, would nevertheless fail to state a claim for secondary liability. *See id.* (holding that the plaintiffs had not pled an aider and abettor claim because they did not adequately allege that defendant “substantially assisted” the primary violator even where the defendant failed to disclose or correct misrepresentations, participated in negotiations and drafting documents, and conducted the closing at its offices); *see also Venturtech II v. Deloitte Haskins & Sells*, 790 F. Supp. 576, 589 (E.D.N.C. 1992) (dismissing aiding and abetting claims against [accountants] because the plaintiffs “ha[d] not presented any evidence indicating that [the accountants] conducted [their] audits with a ‘high conscious intent’ to aid a securities violation”).

Nothing in the record indicates, and no party argues, that Defendants owed any duty to disclose anything directly to Plaintiffs. Additionally, “the PPM expressly advise[d] any potential purchaser that statements in the PPM must be assumed to have been based solely on Triple Net’s own due diligence.” Furthermore, as the Business Court correctly stated, “there is no proof that [Highwoods and TLG] ‘*actually knew*’ of the existence of the facts by reason of which the [primary] liability is alleged to exist,” namely, the alleged misrepresentations Triple Net purportedly made in the PPM. (Emphasis supplied).

Based upon all of the record evidence, including the Business Court’s analysis of the applicable law, we agree with the Business Court’s conclusion that “Plaintiffs have failed to offer proof that either Highwoods or TLG provided material aid with the requisite actual knowledge under the Securities Act.” Therefore, the Business Court did not err in granting Defendants’ motions for summary judgment and dismissing Highwoods

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and TLG from the instant case with prejudice. Plaintiffs' argument is overruled.

C. Judgment on the Pleadings Against Out-of-State Plaintiffs

Plaintiffs argue the Business Court erred by granting Defendants' Rule 12(c) motion for judgment on the pleadings against the fifty-five out-of-state Plaintiffs under N.C. Gen. Stat. § 78A-63(a). They assert this Court should hold that all Plaintiffs, including the out-of-state Plaintiffs, are eligible to proceed on their claims under a proper interpretation of N.C. Gen. Stat. § 78A-56.

Plaintiffs also argue that because the offering at issue in this case was made nationwide, including solicitations to North Carolina citizens who received communications within North Carolina, the requirements of N.C. Gen. Stat. § 78A-63(a) were met for the entire offering and apply to all Plaintiffs. As a result, Plaintiffs argue, civil liability arises for Defendants under sections 78A-56(a) and 78A-56(c) to "any person" who purchased securities, whether or not they received their offer in North Carolina. Because we otherwise affirm the Business Court's orders, which effectively disposed of the lawsuit by granting judgment in favor of Defendants, this argument is moot.

D. Plaintiffs' Common Law Claims

[3] Lastly, Plaintiffs argue the Business Court erred by dismissing their common law claims for fraud, fraud in the inducement, and negligent misrepresentation because Plaintiffs assert they adequately pled justifiable reliance against Defendants. Plaintiffs also argue the Business Court erred by holding that no fraud claims based on indirect reliance are recognizable under North Carolina law.

Regarding Plaintiffs' common law claims, the Business Court concluded "that Plaintiffs have not stated a claim for common law fraud, fraud in the inducement, or negligent misrepresentation because they have not adequately alleged justifiable reliance, which is an element for each of these claims." The Business Court found and concluded Plaintiffs could not transfer any reliance Triple Net had on Defendants Highwoods and TLG's COM to Plaintiffs' reliance on Triple Net's PPM.

Further, "[t]he COM also specifically states that it is being provided only to potential purchasers of 'the interest described herein,' which is purchase of the Subject Property." Finally the Business Court concluded,

[t]o the extent that Plaintiffs want to incorporate Triple Net's reliance on Defendants, they must be constrained by

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the general rule of no duty to speak and by the established rule that when “the purchaser has full opportunity to make pertinent inquiries but fails to do so through no artifice or inducement of the seller, an action in fraud will not lie.” *C.F.R. Foods, Inc. [v. Randolph Development Co.]*, 107 N.C. App. [584,] 589, 421 S.E.2d [386,] 389 (quoting *Libby Hill Seafood Rests., Inc. v. Owens*, 62 N.C. App. 695, 698, 303 S.E.2d 565, 568 (1983)). (Footnotes omitted).

We agree with the Business Court’s review and reasoning, particularly its conclusion that “Plaintiffs cannot transfer Triple Net’s reliance on the COM to their reliance on the PPM. *See Raritan River Steel Co. v. Cherry, Bekaert & Holland, Gen. P’ship*, 322 N.C. 200, 205–07[, 367 S.E.2d 609, 612] (1988).”

“The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care.” *Raritan*, 322 N.C. at 206, 367 S.E.2d at 612 (citations omitted). In *Raritan*, the Supreme Court of North Carolina rejected the concept of indirect reliance or “reliance by proxy” for purposes of common law misrepresentation claims. *Id.* In that case, the plaintiffs allegedly relied upon financial information in a report that was based on faulty financial statements, prepared by an accountant, but the plaintiffs did not rely on the faulty financial statements *themselves*. *Id.* at 205, 367 S.E.2d at 612. The Supreme Court concluded “that a party cannot show justifiable reliance on information contained in audited financial statements without showing that he relied upon the actual financial statements themselves to obtain this information.” *Id.* at 206, 367 S.E.2d at 612.

Plaintiffs have alleged Defendants’ actively concealed and misrepresented facts to Triple Net, and Defendants knew Triple Net was repeating their misrepresentations to TIC purchasers. Plaintiffs assert they have stated a valid claim for fraud, which distinguishes negligent statements from those known to be false. We disagree.

The COM, issued by Defendants Highwoods and TLG, when compared with the PPM issued by Triple Net, contained different renewal probabilities for the cash flow projections and assumptions, which undermine Plaintiffs’ fraud claim. Defendants Highwoods and TLG’s COM included a 75% default renewal rate in its assumptions for four of the five buildings, and a 90% renewal rate in its assumption for the fifth building. By contrast, Triple Net’s PPM projected lower probable rates of renewal, a 50% renewal for one building and a 75% renewal for

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the others. In other words, the very statements in Highwoods and TLG's COM that Plaintiffs claim were misrepresentations upon which they indirectly relied were not copied and republished by Triple Net in the PPM. Triple Net also retained an independent appraiser to provide an appraisal and opinion of the value of the Property.

Furthermore, no Plaintiff ever alleges they saw the Defendants Highwoods and TLG's COM itself. No Plaintiff directly relied upon the information in the COM to make their investment. Even presuming misrepresentations, or outright falsehoods, existed in the COM produced by Defendants Highwoods and TLG, Plaintiffs could not have relied on the COM, a document they had never seen, and which was not republished, copied verbatim, or incorporated into the PPM, which reached different conclusions. *See id.* at 205-06, 367 S.E.2d at 612.

The Business Court did not err in granting Defendants' motions to dismiss Plaintiffs' common law claims for fraud, fraud in the inducement, and negligent misrepresentation. Plaintiffs' arguments are overruled.

VI. Conclusion

We affirm the Business Court's orders dismissing Plaintiffs' claims against Defendants Highwoods and TLG for primary liability under N.C. Gen. Stat. § 78A-56(a), granting summary judgment to Defendants Highwoods and TLG on Plaintiffs' secondary liability claims under N.C. Gen. Stat. § 78A-56(c), and dismissing Plaintiffs' common law claims. Because of our holding, which dismisses all statutory and common law claims against Defendants Highwoods and TLG, Plaintiffs' appeal of Defendants' motion for judgment on the pleadings against out-of-state Plaintiffs under N.C. Gen. Stat. § 78A-63(a) is moot. *It is so ordered.*

AFFIRMED.

Judges BRYANT and DILLON concur.

SEGURO-SUAREZ v. KEY RISK INS. CO.

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MARIO SEGURO-SUAREZ, BY AND THROUGH HIS GUARDIAN AD LITEM,
EDWARD G. CONNETTE, PLAINTIFF

v.

KEY RISK INSURANCE COMPANY, JOSEPH J. ABRIOLA, SHARON SOSEBEE,
SUZANNE MCAULIFFE, CHERYL GLESS, ROBERT E. HILL AND CAROLINA
INVESTIGATIVE SERVICES, INC., DEFENDANTS

No. COA17-697

Filed 4 September 2018

1. Jurisdiction—tort claims—tangentially related to worker's compensation claim—trial court divisions

Tort claims including malicious prosecution asserted by an employee against an insurance company and others arising from a criminal prosecution against him for obtaining worker's compensation benefits by false pretenses, while tangentially related to the employee's worker's compensation claim, were properly brought in the superior court. The N.C. Industrial Commission has exclusive jurisdiction only for claims arising from the processing and handling of a worker's compensation claim, whether intentional or negligent, but its jurisdiction does not extend to claims based on acts occurring outside the course of a worker's compensation proceeding.

2. Malicious Prosecution—initiation of prosecution—intervening independent prosecutorial discretion—motivation for providing information to law enforcement

Plaintiff's complaint for malicious prosecution contained sufficient allegations that defendants initiated prosecution against him, by alleging defendants knowingly provided incomplete, false, and misleading information to law enforcement which caused plaintiff to be charged with obtaining property by false pretenses and insurance fraud for pursuing worker's compensation benefits. Although law enforcement and prosecutors exercise discretion in deciding which cases to prosecute, a person who knowingly provides false information to authorities may be found to have initiated prosecution, and is not protected by the rule that citizens who make reports in good faith, even if incompletely or inaccurately, may do so without fear of retaliation.

3. Abuse of Process—malicious misuse of process after issuance—sufficiency of allegations

Plaintiff alleged sufficient allegations for abuse of process by alleging that after he was charged and arrested for obtaining

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property by false pretenses and insurance fraud for pursuing and taking worker's compensation benefits, defendants caused criminal proceedings to be continued against him for the purpose of recouping funds.

4. Unfair Trade Practices—privity of contract—insurance company of adverse party—third party an intended beneficiary of insurance contract

Plaintiff's claim for unfair and deceptive trade practices (UDTP) was not barred for lack of privity of contract where defendant insurance carrier was already obligated to pay him his workers' compensation benefits at the time it committed tortious conduct by initiating a malicious prosecution against him. The rule that a third-party claimant has no cause of action against the insurance company of an adverse party for UDTP does not apply to employees who are, pursuant to statute, the intended beneficiaries of their employers' compulsory insurance policies.

5. Torts, Other—bad faith—insurance carrier—refusal to pay claim

Plaintiff failed to state a claim for bad faith against his employer's insurance carrier because he did not allege that the carrier refused to pay his valid worker's compensation claim.

6. Conspiracy—civil—insurance company—intra-corporate immunity rule

Plaintiff's assertion that the insurance company paying his worker's compensation benefits conspired with several of its employees to maliciously prosecute him for allegedly taking benefits under false pretenses did not give rise to a valid claim for civil conspiracy, since a corporation cannot conspire with itself.

7. Damages and Remedies—punitive damages—tort claims—sufficiency of allegations

Plaintiff adequately alleged punitive damages pursuant to N.C.G.S. § 1D-15 where his tort claims for malicious prosecution, abuse of process, and unfair and deceptive trade practices (arising from defendants' initiation of a criminal prosecution against plaintiff for obtaining property by false pretenses and insurance fraud for taking worker's compensation benefits on false pretenses) survived defendants' motion to dismiss and he alleged malicious, fraudulent, willful, and wanton conduct.

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Appeal by Defendants Key Risk Insurance Company, Joseph J. Abriola, Sharon Sosebee, Suzanne McAuliffe, and Cheryl Gless from Order entered 30 January 2017 by Judge Jesse B. Caldwell, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 February 2018.

Edwards Kirby L.L.P., by David F. Kirby and William B. Bystrynski, for Plaintiff-Appellee.

Hedrick Gardner Kincheloe & Garofalo LLP, by Mel J. Garofalo, C. Rob Wilson, Linda Stephens, and M. Duane Jones, for Defendant-Appellants Key Risk Insurance Company, Joseph J. Abriola, Sharon Sosebee, Suzanne McAuliffe, and Cheryl Gless.

INMAN, Judge.

When a North Carolina worker is hurt on the job, his injury is within the exclusive scope of the Workers' Compensation Act and he can obtain relief only by pursuing a claim before the North Carolina Industrial Commission (the "Commission"). But when, after the Commission awards the injured worker benefits, an employer's insurance company knowingly provides false information to police to frame him for insurance fraud, resulting in his arrest, incarceration, and indictment on felony charges, the worker's claims for malicious prosecution, abuse of process, and unfair and deceptive trade practices ("UDTP") exceed the scope of the Workers' Compensation Act and are properly before the General Court of Justice.

Plaintiff Mario Seguro-Suarez ("Plaintiff") brought suit against Defendants Key Risk Insurance Company ("Key Risk"), Joseph J. Abriola, Sharon Sosebee, Suzanne McAuliffe, and Cheryl Gless (collectively the "Individual Defendants" together with Key Risk as "Defendants")¹ for malicious prosecution, abuse of process, UDTP, bad faith, willful and wanton conduct, conspiracy, and punitive damages. Defendants appeal the denial of their motions to dismiss all of Plaintiff's claims pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. After careful review of the record and applicable law, we hold that the trial court did not err in denying the motions to dismiss pursuant to Rule 12(b)(1), but that it did err in failing to dismiss Plaintiff's

1. The other defendants named in the action, Robert E. Hill and Carolina Investigative Services, Inc., did not appeal. We therefore limit our use of "Defendants" in this opinion to Key Risk and the Individual Defendants.

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bad faith and civil conspiracy claims under Rule 12(b)(6). We therefore affirm the trial court's order in part, reverse in part, and remand for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

The record below, consisting primarily of the allegations in Plaintiff's complaint, indicates the following:

In 2003, Plaintiff was working for his employer, Southern Fiber, when he fell from a height of approximately 18 feet onto concrete, striking his head. As a result of the fall, Plaintiff suffered several broken bones and severe traumatic brain injury. He was rendered comatose, required intubation and ventilation support to breathe, and underwent emergency neurosurgery at Carolinas Medical Center in Charlotte, North Carolina, to relieve pressure on his brain. He eventually emerged from his coma but the brain injury changed his personality, required physical, speech, and occupational therapy, and Plaintiff currently suffers from significant behavioral and memory deficits, including deficits in executive functioning, problem solving, planning, and balance. Plaintiff's injuries have rendered him dependent on others for: (1) dressing; (2) feeding; (3) toileting; (4) assistance in daily activities; (5) grooming; (6) bathing; and (7) home management. Southern Fiber and Key Risk, as Southern Fiber's insurance carrier, admitted that Plaintiff's injuries were compensable.

While Plaintiff was in inpatient care, Key Risk was informed multiple times that Plaintiff would require 24-hour care upon discharge. Rather than provide for care at an assisted living center or by an at-home professional caregiver, Key Risk and its employees arranged for Plaintiff's 18-year-old daughter, who had immigrated to the United States only two months prior, to assume all home care for Plaintiff. After approximately 11 weeks, Plaintiff's daughter moved him into the home of a family friend, who assumed caregiving duties. Key Risk did not pay Plaintiff's daughter or friend for assuming the 24-hour care of Plaintiff.

Plaintiff saw an authorized treating physician, Dr. Flora Hammond, throughout 2003, 2004, and 2005. Dr. Hammond performed multiple tests on Plaintiff to discern the nature and extent of his condition, with each test showing symptoms consistent with traumatic brain injury. Dr. Hammond also requested an occupational home therapy evaluation, as she recognized that Plaintiff continued to suffer injuries as a result of several falls stemming from his balance issues. Key Risk denied the request and refused to provide the evaluation. Dr. Hammond later requested an evaluation by a neurologist, which Key Risk again declined to provide; instead, Plaintiff was evaluated by Dr. Thomas Gaultieri, a

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neuropsychologist. Key Risk refused to authorize continued treatment by Dr. Hammond after Plaintiff was referred to Dr. Gaultieri.

Dr. Gaultieri treated Plaintiff from 2005 to mid-2007. Though he first believed Plaintiff was legitimately suffering from the conditions described above, Key Risk eventually provided Dr. Gaultieri with video footage that convinced him otherwise. The video, cut from 9 hours of surveillance footage taken by Key Risk over a six-month period and edited down to 45 minutes, led Dr. Gaultieri to opine that Plaintiff was willfully exaggerating his symptoms and that he needed no further treatment.

The above conduct by Key Risk in administering Plaintiff's care for an admittedly compensable injury led to considerable litigation. In 2008, a deputy commissioner of the Commission ordered Key Risk to authorize further treatment by Dr. Hammond, and Plaintiff returned to her care. In 2010, after Key Risk argued that Plaintiff's benefits should be cut off for fraud and misrepresentation, a deputy commissioner entered an opinion and award requiring Key Risk to pay continued compensation for Plaintiff's care. On 29 April 2011, the Full Commission entered its own opinion and award in Plaintiff's favor (the "Opinion and Award"). Not only did the Full Commission award Plaintiff continued benefits, but it concluded as a matter of law that "[Key Risk and Southern Fiber] brought and defended this claim without reasonable grounds. . . . [Key Risk's and Southern Fiber's] position is not based upon reason." As a result, the Full Commission awarded Plaintiff attorney's fees, continued Key Risk's payment obligations in the amount of \$345.35 per week "until further Order of the [Commission,]" and ordered that Plaintiff's daughter and family friend be reimbursed for their caregiving services, finding that Key Risk's refusal to pay prior to the entry of the Opinion and Award "was unreasonable and . . . constituted stubborn, unfounded litigiousness." Key Risk filed an untimely appeal of the Full Commission's decision to this Court, which was dismissed by order. Order, *Seguro-Suarez v. Southern Fiber*, COA12-238-1 (N.C. Ct. App. May 15, 2012). Key Risk next petitioned the North Carolina Supreme Court for writ of certiorari, but its petition was denied. *Seguro-Suarez v. Southern Fiber*, 366 N.C. 408, 735 S.E.2d 324 (2012).

Following its losses before the Commission, and after exhausting its appeal efforts, Key Risk, by and through its employees Individual Defendants, hired Carolina Investigative Services and Robert E. Hill (the "Investigator") to surreptitiously surveil and record Plaintiff for several weeks. Key Risk also arranged for an independent medical exam of Plaintiff on 10 June 2013 in order to determine whether his symptoms were legitimate and if Plaintiff actually required ongoing care.

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The forensic psychiatrist who examined Plaintiff observed Plaintiff's "childlike" demeanor and concluded he was suffering from dementia, traumatic brain injury, chronic dizziness, and chronic headaches—all stemming from his workplace injury. Key Risk's chosen examiner further opined that Plaintiff's "symptoms appeared to be valid. There was no apparent malingering, in [her] opinion."

The mounting medical evidence and full-throated rebuke from the Commission left Key Risk undeterred in its efforts to undermine Plaintiff's medical diagnosis and continued care. After the independent medical exam, Key Risk directed its Investigator to convince the Lincolnton Police Department (the "LPD") to bring criminal charges against Plaintiff under the theory that he was obtaining his workers' compensation benefits by false pretenses, *i.e.*, by faking his diagnosed symptoms from his traumatic brain injury. The Investigator provided the LPD with an extensively edited videotape similar to that shown to Dr. Gaultieri in the proceeding before the Commission; as a result, the LPD arrested and jailed Plaintiff on 24 October 2013. On 10 March 2014, Plaintiff was indicted on 25 counts of obtaining property by false pretenses and one count of insurance fraud, all for accepting the checks ordered paid to him by the Commission.

After his first appearance in criminal court, Plaintiff was ordered to undergo a psychological examination at Central Regional Hospital in Butner, North Carolina to determine his competency to stand trial. The examining psychologist noted that Plaintiff "exhibited cognitive deficit consistent with his documented history, including memory impairment[,] and concluded that Plaintiff was mentally incapable of both proceeding to trial and effectively assisting counsel. The State ultimately dismissed all charges against Plaintiff after a hearing in which the trial court asked the State if it "really want[ed] to assist in the establishment of a malicious prosecution claim[,] and expressed "some real concerns when a man is drawing a check pursuant to an order, in effect, pursuant to a court order, and one side doesn't like the court order and decides to take out criminal charges because they disagree with what the ruling was."

After his release from custody, Plaintiff filed suit against Defendants and the Investigator in Mecklenburg County Superior Court, asserting causes of action for: (1) malicious prosecution; (2) abuse of process; (3) UDTP; (4) bad faith; (5) willful and wanton conduct; (6) civil conspiracy; and (7) punitive damages. Plaintiff's complaint asserts that Defendants undertook the above actions with the aim of terminating Plaintiff's workers' compensation benefits and relieving Key Risk of its financial burden. Defendants filed a motion to dismiss pursuant to Rules of Civil

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Procedure 12(b)(1) and 12(b)(6), asserting that the trial court lacked subject matter jurisdiction and that the complaint failed to state a claim upon which relief could be granted. The trial court denied Defendants' motion by order entered 30 January 2017, and Defendants timely filed their notice of appeal on 13 February 2017.

II. ANALYSIS**A. *Appellate Jurisdiction***

The denial of a motion to dismiss brought pursuant to Rules 12(b)(1) and 12(b)(6) is an interlocutory order and typically not subject to immediate appellate review unless it affects a substantial right. *See, e.g., Murray v. Univ. of N.C. at Chapel Hill*, 246 N.C. App. 86, 91-95, 782 S.E.2d 531, 535-37 (2016), *aff'd per curiam*, 369 N.C. 585, 792 S.E.2d 612 (2017) (reviewing case law concerning immediate appeals of motions to dismiss under Rules 12(b)(1) and 12(b)(6)). However, "our Supreme Court has determined that the denial of a motion to dismiss under Rule 12(b)(1) and the exclusivity provision of the [Workers' Compensation] Act affects a substantial right 'and will work injury if not corrected before final judgment' " *Estate of Vaughn v. Pike Elec., LLC*, 230 N.C. App. 485, 491, 751 S.E.2d 227, 231 (2013) (quoting *Burton v. Phx. Fabricators & Erectors, Inc.*, 362 N.C. 352, 661 S.E.2d 242 (2008)). Because Defendants' motion to dismiss expressly "contend[s] that th[e trial court] lacks subject matter jurisdiction . . . pursuant to the North Carolina Workers' Compensation Act" under Rule 12(b)(1), the denial of their motion on that ground affects a substantial right and is immediately appealable. *See Vaughn*, 230 N.C. App. at 491, 751 S.E.2d at 231.

As for the denial of Defendants' motion to dismiss pursuant to Rule 12(b)(6), Defendants request that we exercise our discretion to consider their appeal thereof "to expedite the administration of justice," as allowed in *Flaherty v. Hunt*, 82 N.C. App. 112, 113, 345 S.E.2d 426, 427 (1986). Plaintiff, for his part, asserts no argument against such an exercise. Because this Court already has jurisdiction over the denial of Defendants' motion pursuant to Rule 12(b)(1), and in the absence of any argument to the contrary, we exercise our discretion to hear Defendants' appeal of the denial of their motion to dismiss under Rule 12(b)(6). *Id.* at 113-14, 345 S.E.2d at 428.

B. *Standards of Review*

We consider the denial of a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction *de novo*, in which we "consider[] the matter anew and freely substitute[] [our] judgment for that of the

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[trial court].” *Blow v. DSM Pharms., Inc.*, 197 N.C. App. 586, 588, 678 S.E.2d 245, 248 (2009) (internal quotation marks and citation omitted) (final alteration in original). In this review, we take as true all allegations in the complaint. *Good Hope Hosp., Inc. v. N.C. Dept. of Health and Human Svcs.*, 174 N.C. App. 266, 274, 620 S.E.2d 873, 880 (2005). But we also are permitted to consider matters outside the pleadings. *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007).

Similarly, we apply the *de novo* standard to review a trial court’s ruling on a motion to dismiss pursuant to Rule 12(b)(6). *Green v. Kearney*, 203 N.C. App. 260, 265, 690 S.E.2d 755, 761 (2010). “The scope of our review is ‘whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.’” *Holton v. Holton*, ___ N.C. App. ___, ___, 813 S.E.2d 649, 655 (2018) (quoting *State Emps. Ass’n of N.C., Inc. v. N.C. Dep’t of State Treasurer*, 264 N.C. 205, 210, 695 S.E.2d 91, 95 (2010)). “We consider the allegations in the complaint true, construe the complaint liberally, and only reverse the trial court’s denial of a motion to dismiss if plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim.” *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (citation omitted).

C. Subject Matter Jurisdiction

[1] Defendants argue that three prior decisions by this Court compel a conclusion that the Commission exercises exclusive jurisdiction over the tort claims alleged in Plaintiff’s complaint. We reject this argument, because each of the prior decisions is inapposite to this matter. We address each in turn.

In *Johnson v. First Union Corp.*, 131 N.C. App. 142, 504 S.E.2d 808 (1998), we held that the Commission has exclusive jurisdiction “over workers compensation claims and all related matters” 131 N.C. App. at 143-44, 504 S.E.2d at 809. *Johnson* involved alleged tortious acts in the procedural course of workers’ compensation proceedings that directly resulted in claims being denied by the Commission. *Id.* at 143, 504 S.E.2d at 809. The plaintiffs, two employees previously diagnosed with repetitive motion injuries, brought suit in superior court alleging that their employer and its insurance carrier presented a fraudulent videotape to their physician inaccurately portraying the physical requirements of their jobs, causing the physician to withdraw the diagnosis of work-related injury. *Id.* at 143, 504 S.E.2d at 809. One plaintiff also alleged that the employer fraudulently altered a workers’ compensation form after she had signed it, further interfering with the proceeding. *Id.* at 143, 504

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S.E.2d at 809. We held that the Commission had exclusive jurisdiction to address fraud in the settlement of a workers' compensation claim and affirmed the trial court's dismissal of the plaintiffs' civil claims because "the Workers' Compensation Act is a comprehensive regulatory scheme, and collateral attacks are inappropriate." *Id.* at 145, 504 S.E.2d at 810.

In *Deem v. Treadway & Sons Painting & Wallcovering, Inc.*, 142 N.C. App. 472, 477-78, 543 S.E.2d 209, 212-13 (2001), the plaintiff filed suit in superior court to set aside the settlement of his workers' compensation claim, alleging that it was predicated on fraudulent and unlawful acts committed by the defendants, including his employer and its insurer. We held that, because the Commission possessed express statutory authority to set aside a workers' compensation settlement for fraud, the "plaintiff's sole remedy in this case was to petition the Industrial Commission to set aside his agreement" *Id.* at 478, 543 S.E.2d at 212. We reasoned that the plaintiff's complaint was "nothing more than an allegation that defendants did not appropriately handle his workers' compensation claim, and thus he was injured because he did not receive his entitled benefit. This is the exact argument of the *Johnson* plaintiffs" *Id.* at 477, 543 S.E.2d at 212.

Bowden v. Young, 239 N.C. App. 287, 768 S.E.2d 622 (2015), like *Deem* and *Johnson*, involved alleged tortious acts conducted within the course of a workers' compensation proceeding in the Commission. The employee in *Bowden* brought suit in superior court for bad faith and intentional infliction of emotional distress, asserting that his employer's insurance carrier "communicated with his doctors without his permission[,] . . . wrongly sought a second opinion[,] . . . treated him belligerently over the phone, denied some of his requests for medical treatment via 'form letter,' improperly filed paperwork to suspend his compensation, and 'insisted that [the employee] needed to settle his Workers Compensation claim.'" 239 N.C. at 289, 768 S.E.2d at 624. In affirming the trial court's dismissal of the action, this Court explained that "[w]e distill from *Johnson* and *Deem* a straightforward rule: all claims arising from an employer's or insurer's processing and handling of a workers' compensation claim fall within the exclusive jurisdiction of the Industrial Commission, regardless of whether the alleged conduct was intentional or merely negligent." *Id.* at 291, 768 S.E.2d at 625.

We further recognized in *Bowden* that the "the Industrial Commission, charged with administration of the Workers' Compensation Act, is better suited than the Court to identify and regulate alleged abuses, if any, by insurance carriers and health care providers in matters under the

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Workers' Compensation Act.' " *Id.* at 290, 768 S.E.2d at 624-25 (quoting *N.C. Chiropractic Ass'n, Inc. v. Aetna Cas. & Sur. Co.*, 89 N.C. App. 1, 9, 365 S.E.2d 312, 316 (1988)). Although we acknowledged that intentional torts "generally fall outside the scope of the Workers' Compensation Act," *id.* at 290, 768 S.E.2d at 625 (citing *Woodson v. Rowland*, 329 N.C. 330, 340-41, 407 S.E.2d 222, 228 (1991)), we affirmed the trial court's dismissal of the employee's complaint, because "*all* claims concerning the *processing* and *handling* of a workers' compensation claim are within the exclusive jurisdiction of the Industrial Commission, whether the alleged conduct is intentional or not." *Id.* at 290-91, 768 S.E.2d at 625 (citing *Johnson*, 131 N.C. App. at 143-44, 504 S.E.2d at 809; *Deem*, 142 N.C. App. at 477-78, 543 S.E.2d at 212) (emphasis in original).

To apply the "straightforward rule" recognized in *Johnson*, *Deem*, and *Bowden* to Plaintiff's action, as Defendants request, would stretch it beyond its factual and legal underpinnings. Plaintiff's complaint does not allege that he has been denied any workers' compensation benefits; to the contrary, he acknowledged at the final hearing in the criminal matter that Key Risk was still making the workers' compensation payments. Plaintiff's action, therefore, is markedly different from those brought in *Johnson* and *Deem*, which involved "allegation[s] that defendants did not appropriately handle his workers' compensation claim, and thus he was injured *because he did not receive his entitled benefit.*" *Deem*, 142 N.C. App. at 477, 543 S.E.2d at 212 (emphasis added); *see also Johnson*, 131 N.C. App. at 143-44, 504 S.E.2d at 809. Plaintiff's case is further distinguishable from *Johnson*, *Deem*, and *Bowden* because, fundamentally, it does not concern the "*processing* and *handling* of a workers' compensation claim . . ." *Bowden*, 239 N.C. App. at 290, 768 S.E.2d at 625 (citing *Johnson*, 131 N.C. App. at 143-44, 504 S.E.2d at 809 and *Deem*, 142 N.C. App. at 477-78, 543 S.E.2d at 212) (emphasis in original).

Plaintiff's tort claims, though tangentially associated with his ongoing workers' compensation payments, concern the initiation and continued pursuit of a *criminal prosecution*, not a workers' compensation claim. "General jurisdiction for the trial of criminal actions is vested in the superior court and the district court divisions of the General Court of Justice." N.C. Gen. Stat. § 7A-270 (2017). By contrast, "the North Carolina Industrial Commission is not a court of general jurisdiction; the Commission is a quasi-judicial administrative board created by the legislature to administer the Workers' Compensation Act and has no authority beyond that provided by statute." *Cornell v. W. and S. Life Ins. Co.*, 162 N.C. App. 106, 108, 590 S.E.2d 294, 296 (2004); *see also Barber v. Minges*, 223 N.C. 213, 217, 25 S.E.2d 837, 839 (1943) ("The

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Industrial Commission is not a court of general jurisdiction. *It can have no implied jurisdiction beyond the presumption that it is clothed with power to perform the duties required of it by the law entrusted to it for administration.*" (emphasis added)).

Law enforcement officers and prosecutors employed by the State and its subdivisions are not tasked with "processing and handling" workers' compensation claims, and neither are the district and superior court divisions of the General Court of Justice. Malicious use and abuse thereof, therefore, does not "aris[e] from . . . [the] processing and handling of a workers' compensation claim . . . within the exclusive jurisdiction of the Industrial Commission[.]" *Bowden*, 239 N.C. App. at 290, 768 S.E.2d at 625.

Although Plaintiff's complaint alleges that Defendants committed tortious acts in order to avoid liability to pay his workers' compensation, motivational concerns are irrelevant to our analysis. Taken to its logical end, this argument would allow a workers' compensation carrier to hire an assassin to kill an injured employee in order to terminate ongoing workers' compensation but avoid tort liability for wrongful death in civil court. Our Supreme Court has expressly held that:

When an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in the case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, *and civil actions based thereon are not barred by the exclusivity provisions of the [Workers' Compensation] Act.*

Woodson, 329 N.C. at 340-41, 407 S.E.2d at 228 (emphasis added). Indeed, *Bowden* recognized that "intentional torts generally fall outside the scope of the Workers' Compensation Act" based on *Woodson*, 239 N.C. App. at 290, 768 S.E.2d at 625, and "distilled from *Johnson* and *Deem* a straightforward rule" that operates independently of any motivational considerations. That rule is limited to "all claims arising from an employer's or insurer's processing and handling of a workers' compensation claim . . . regardless of whether the alleged conduct was intentional or merely negligent." 239 N.C. App. at 291, 768 S.E.2d at 625.

Because the acts complained of in Plaintiff's complaint do not "aris[e] from an employer's or insurer's processing and handling of a workers' compensation claim[.]" *id.* at 91, 768 S.E.2d at 625, we reject

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Defendants' argument that motivational considerations, rather than the factual and legal underpinnings of this case, would somehow bring this action within the exclusive jurisdiction of the Commission.² Plaintiff's claims do not fall within the scope of the Workers' Compensation Act, and, as a result, the trial court did not err in denying Defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).

D. Rule 12(b)(6)

In the alternative to their argument under Rule 12(b)(1), Defendants posit that Plaintiff's complaint entirely fails to state a claim upon which relief can be granted under Rule 12(b)(6). We therefore address each of Plaintiff's individual claims in turn.

1. Malicious Prosecution

[2] Plaintiff's first claim seeks redress for malicious prosecution. "To establish malicious prosecution, a plaintiff must show that the defendant (1) initiated or participated in the earlier proceeding, (2) did so maliciously, (3) without probable cause, and (4) the earlier proceeding ended in favor of the plaintiff." *Turner v. Thomas*, 369 N.C. 419, 425, 794 S.E.2d 439, 444 (2016) (citing *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc.*, 366 N.C. 505, 512, 742 S.E.2d 781, 786 (2013)). Defendants contend that Plaintiff has failed to allege the first "initiation" element of a malicious prosecution claim because, under their reading of *Farm Bureau*, "[p]arties cannot be liable for malicious prosecution where they provide information to law enforcement and prosecutors later decide to initiate criminal proceedings based on that information, even if the information provided was inaccurate or incomplete." Defendants' argument is unpersuasive.

In *Farm Bureau*, an investigator for the insurance company conducted an in-depth investigation of a house fire following a claim by an insured. 366 N.C. at 508-509, 742 S.E.2d at 784-85. The investigator

2. Defendants contend that an allegation in Plaintiff's complaint that Defendants' tortious acts "relate[d] to the defense of the worker's compensation claim" necessitates a holding that Plaintiff's action "arise[s] from" said workers' compensation claim. As explained *supra*, this is not so—that Defendants' motivation was to terminate the obligation to pay Plaintiff compensation does not render the tortious acts themselves "arising from . . . [Key Risk's] processing and handling of [Plaintiff's] workers' compensation claim[.]" *Bowden*, 239 N.C. App. at 292, 768 S.E.2d at 625, where they in fact arise from the processing and handling of a criminal prosecution. This argument is analogous to the defense of a person charged with killing a homeowner in the course of a burglary, who argues that he cannot be prosecuted for murder because the death was only incidental to his motivation to steal.

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discovered evidence suggesting that the house fire was not an accident but the result of arson on the part of the insured, and he provided this information to local law enforcement. *Id.* at 509-10, 742 S.E.2d at 785. Law enforcement arrested the insured but the district attorney later dismissed all criminal charges; the insured thereafter brought a malicious prosecution claim against the insurance company. *Id.* at 510, 742 S.E.2d at 785. Following a bench trial, the insurer was found liable for malicious prosecution, a ruling that was later affirmed by this Court on the basis that, but for the insurer's actions, the insured would not have been prosecuted. 220 N.C. App. 212, 725 S.E.2d 638 (2012). The Supreme Court, however, reversed our decision, holding that "the Court of Appeals' interpretation of the element of initiation in a malicious prosecution case does not account adequately for the roles played by police and prosecutorial discretion." 366 N.C. at 513, 742 S.E.2d at 787. Our Supreme Court instead adopted the following language from the Restatement (Second) of Torts:

Influencing a public prosecutor. A private person who gives to a public official information of another's supposed criminal misconduct, of which the official is ignorant, obviously causes the institution of such subsequent proceedings as the official may begin on his own initiative, but giving the information or even making an accusation of criminal misconduct does not constitute a procurement of the proceedings initiated by the officer if it is left entirely to his discretion to initiate the proceedings or not. When a private person gives to a prosecuting officer information *that he believes to be true*, and the officer in exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rule stated in this Section even though the information proves to be false and his belief was one that a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.

Id. at 513, 742 S.E.2d at 787 (quoting Restatement (Second) of Torts § 653 cmt. g (1977) (emphasis added)). Though the Court noted the Restatement's formulation "allows citizens to make reports in good faith to police and prosecutors without fear of retaliation if the information proves to be incomplete or inaccurate[.]" it went on to note that "[i]f the

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information is false, *this formulation only protects a party who believes it to be true*. . . .” *Id.* at 513-14, 742 S.E.2d at 787 (emphasis added). A party therefore “initiates” a malicious prosecution under *Farm Bureau* irrespective of independent prosecutorial discretion when it knowingly provides false information to authorities. *Id.* at 514, 742 S.E.2d at 787.

Here, Plaintiff’s complaint alleges that Defendants “decided to falsely and maliciously accuse [Plaintiff] of committing insurance fraud and taking property by false pretenses,” that they “caused criminal proceedings to be initiated against [him,]” and that they “acted with malice in providing false and misleading information to the [LPD]”³ It further alleges that Defendants “intentionally and maliciously caused incomplete, false and misleading information [to] be given to the [LPD]” Employing a liberal construction of Plaintiff’s complaint, we hold that these allegations are sufficient to survive Defendants’ motion to dismiss pursuant to Rule 12(b)(6), and affirm the trial court’s denial thereof on this claim.⁴

2. Abuse of Process

[3] Plaintiff’s second claim for relief is for abuse of process. “Two elements must be proved to find abuse of process: (1) that the defendant had an ulterior motive to achieve a collateral purpose not within the normal scope of the process used, and (2) that the defendant committed some act that is a ‘malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ.’” *Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 602, 646 S.E.2d 826, 831 (2007) (quoting *Stanback v. Stanback*, 297 N.C. 181, 200, 254 S.E.2d 611, 624 (1979)) (emphasis in original). Here, Defendants contend that Plaintiff has failed to allege facts satisfying the second element because “the Complaint does not allege that the Defendants took any actions after providing information to the LPD.” Again, we disagree. The complaint alleges that after Plaintiff was charged and arrested, “Defendants caused criminal proceedings to be continued against [him], which led to him being indicted” It further alleges that, “[a]fter the warrants for arrest were issued, the defendants used the process

3. Although this allegation is made under a different cause of action, dismissal under Rule 12(b)(6) is not proper where “the allegations of the complaint . . . are sufficient to state a claim . . . under some legal theory, *whether properly labeled or not*.” *Chapel H.O.M. Assocs., LLC v. RME Mgmt., LLC*, ___ N.C. App. ___, ___, 808 S.E.2d 576, 578 (2017) (emphasis added) (quoting *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003)).

4. Whether these allegations ultimately are supported by evidence is yet to be determined.

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to attempt to recoup its [sic] funds” We hold these allegations are sufficient under our liberal pleading standards to set forth the second element of an abuse of process claim and affirm the trial court’s denial of Defendants’ motion on this ground.

3. Unfair and Deceptive Trade Practices

[4] Plaintiff’s third cause of action asserts a UDTF claim against Key Risk based on Section 75-1.1 of the North Carolina General Statutes. Defendants argue that Plaintiff’s claim is barred for lack of privity, relying on our holding in *Wilson v. Wilson*, 121 N.C. App. 662, 468 S.E.2d 495 (1996), that “North Carolina does not recognize a cause of action for third-party claimants against the insurance company of an adverse party based on unfair and deceptive trade practices under [N.C. Gen. Stat.] § 75-1.1.” 121 N.C. App. at 665, 468 S.E.2d at 497. Plaintiff contends that, because Key Risk was already obligated to pay him his workers’ compensation benefits at the time of its tortious conduct, *Wilson* should not bar his claim. Reviewing *Wilson* and subsequent case law, we agree with Plaintiff.

The same year that *Wilson* was decided, this Court held it was inapposite to a third party’s UDTF claim against an insured driver’s carrier. *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 15, 472 S.E.2d 358, 366 (1996). In *Murray*, we first acknowledged that “[o]ur case law establishes that ‘if the third party is an intended beneficiary, the law implies privity of contract.’” We then held that “[t]he injured party in an automobile accident is an intended third-party beneficiary to the insurance contract between insurer and the tortfeasor/insured party[,]” and that “the instant [third-party] plaintiff is in contractual privity with [the driver’s carrier], and for this reason alone, is not bound by the third-party restrictions set forth in *Wilson*.” *Id.* at 15, 472 S.E.2d at 366. Nearly a decade later, we construed *Murray* to require a third-party plaintiff to first obtain a judgment before bringing a UDTF claim against the insurer. *Craven v. Demidovich*, 172 N.C. App. 340, 342, 615 S.E.2d 722, 724 (2005).

Most recently, this Court has summarized the rule of *Murray* and its progeny as follows: “In the automobile accident context, an injured party is recognized as a third-party beneficiary to the liability insurance policy, because, under the statute, ‘[t]he primary purpose of th[e] compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by financially irresponsible motorists.’” *USA Trouser, S.A. de C.V. v. Williams*, ___ N.C. App. ___, ___, 812 S.E.2d 373, 377 (2018) (quoting *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 440, 238 S.E.2d 597, 604 (1977)). This Court has further recognized the imposition of privity between third parties and insurers sufficient to

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support a UDTP claim when similar statutory obligations exist for like purposes. *Nash Hosps., Inc. v. State Farm Mut. Auto. Ins. Co.*, ___ N.C. App. ___, ___, 803 S.E.2d 256, 263 (2017) (holding insurance company liable for payment practices violating the statutory subrogation rights of a claimant's medical providers), *disc. rev. denied*, ___ N.C. ___, 809 S.E.2d 869 (2018).

In *Nash Hospitals*, after providing medical treatment to a person injured in an automobile accident, Nash Hospitals sent notice of a medical lien to State Farm, the injuring party's insurer. *Id.* at ___, 803 S.E.2d at 259. The injured person, unrepresented by counsel, negotiated a settlement with the insurer, State Farm, who issued a joint check to the injured person, Nash Hospitals, and a third medical lienholder. *Id.* at ___, 803 S.E.2d at 258-59. Nash Hospitals informed State Farm that the issuance of a joint check violated Sections 44-49 and 44-50 of our General Statutes, which required insurers to pay valid medical liens prior to any settlement disbursement to a claimant. *Id.* at ___, 803 S.E.2d at 259. When State Farm refused to otherwise satisfy the medical lien, Nash Hospitals filed suit for UDTP against State Farm and ultimately obtained a favorable judgment on the merits. *Id.* at ___, 803 S.E.2d at 259. State Farm appealed the judgment, arguing that, based on *Wilson*, Nash Hospitals lacked privity to sue the insurer. *Id.* at ___, 803 S.E.2d at 262-63. We disagreed, holding that, because Sections 44-49 and 44-50 were enacted "to protect hospitals and other health care providers that provide medical services to injured persons[,] they "expanded the scope of [third-party beneficiary] privity to hospitals and medical service providers." *Id.* at ___, 803 S.E.2d at 263. Because Nash Hospitals was in statutory privity with State Farm, and because the UDTP claim involved post-settlement conduct, we held *Wilson* inapposite and affirmed that portion of the trial court's judgment. *Id.* at ___, 803 S.E.2d at 263.

Like compulsory automobile insurance, "[t]he General Assembly has mandated that every employer subject to the Workers' Compensation Act maintain the ability to pay compensation benefits, either by purchasing workers' compensation insurance . . . or by self-insuring." *N.C. Ins. Guar. Ass'n v. Board of Trs. of Guilford Tech. Cmty. College*, 364 N.C. 102, 108-09, 691 S.E.2d 694, 698 (2010) (citing N.C. Gen. Stat. § 97-93 (2007)). And, just as "[t]he primary purpose of th[e] compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by financially irresponsible motorists[.]" *Chantos*, 293 N.C. at 440, 238 S.E.2d at 604, "[t]he [p]rimary consideration [of the Workers' Compensation Act] is compensation for injured employees. . . . 'The title and theory of the act import the idea of compensation for work[ers] and their dependents.'" *Roberts v. City Ice & Fuel Co.*, 210 N.C. 17, 21, 185

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S.E. 438, 440-41 (1936) (quoting *Hodges v. Mortgage Co.*, 201 N.C. 701, 704, 161 S.E. 220, 222 (1931)).

Given the marked similarities between the compulsory automobile and workers' compensation insurance statutes, the reasoning in *Murray* that an "injured party in an automobile accident is an intended third-party beneficiary to the insurance contract between insurer and the tortfeasor/insured party," 123 N.C. App. at 15, 472 S.E.2d at 366, supports our holding that Plaintiff is an intended third-party beneficiary of Southern Fiber's insurance contract with Key Risk. Indeed, the Workers' Compensation Act itself provides that a workers' compensation insurance policy must "contain[] the agreement of the insurer that it will promptly pay to the person entitled to same all benefits conferred by this Article. . . . Such agreement shall be construed to be *a direct promise by the insurer to the person entitled to compensation enforceable in his name.*" N.C. Gen. Stat. § 97-98 (2017) (emphasis added). Our Supreme Court has held that this provision creates an express benefit for, and enforceable by, the employee. *See Hartsell v. Thermoid Co., Southern Division*, 249 N.C. 527, 533, 107 S.E.2d 115, 119 (1959) ("Under the Act, plaintiff has a right to enforce the insurance contract *made for his benefit.*" (citing N.C. Gen. Stat. § 97-98)). Because employees are, by statutory mandate, intended third-party beneficiaries of their employers' compulsory insurance policies, we hold that "the instant plaintiff is in contractual privity [with the insurer] . . . and for this reason alone, is not bound by the third-party restrictions set forth in *Wilson.*" *Murray*, 123 N.C. App. at 15, 472 S.E.2d at 366.

Defendants urge this Court to reach a contrary result on the basis that they continue to litigate Plaintiff's compensation pursuant to N.C. Gen. Stat. § 97-18.1(c), so that the Opinion and Award requiring payment to Plaintiff is not akin to a civil judgment. Defendants further argue that allowing Plaintiff's UDTP claim to continue creates a potential conflict of interest for Key Risk with respect to its insured, Plaintiff's employer. *See Wilson*, 121 N.C. App. at 667, 468 S.E.2d at 498 ("[A]llowing a third-party claim against the insurer of an adverse party for violating [N.C. Gen. Stat.] § 58-63-15 may result in a conflict of interest for the insurance company."); *but see Murray*, 123 N.C. App. at 10, 472 S.E.2d at 363 (holding a third-party beneficiary of an automobile liability insurance contract could pursue a UDTP claim against the insured's carrier for violation of N.C. Gen. Stat. § 58-63-15). We reject these arguments.

Unlike the insurer in *Wilson*, Defendants have an ongoing legal obligation to pay Plaintiff as required by the Opinion and Award and Key Risk's own insurance policy with Southern Fiber. "[W]here the policy of

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insurance is against liability . . . and the liability of the insured has been established by judgment, the injured person may maintain an action on the policy of insurance, *that is, coverage attaches when liability attaches . . .*” *Hall v. Harleysville Mut. Cas. Co.*, 233 N.C. 339, 340, 64 S.E.2d 160, 161 (1951) (citations omitted) (emphasis added); *see also Craven*, 172 N.C. App. at 342, 615 S.E.2d at 124 (quoting *Lavender v. State Farm. Mut. Auto. Ins. Co.*, 117 N.C. App. 135, 136, 450 S.E.2d 34, 35 (1994), and *Hall* to explain the necessity of a civil judgment to bring a UDTP claim as a third-party beneficiary against an insurer under *Murray*). Key Risk’s insurance policy with Southern Fiber states that the former will “pay promptly when due the benefits required of [Southern Fiber] by the workers compensation law.” Key Risk’s liability to Plaintiff therefore attached, at the latest,⁵ upon entry of the Opinion and Award, as “a payment is due and payable when the Commission has entered an opinion awarding benefits to a claimant.” *Smith v. Richardson Sports Ltd. I.C. Partners d/b/a Carolina Panthers*, 172 N.C. App. 200, 206, 616 S.E.2d 245, 250 (2005) (citation omitted).

Also, Section 97-18.1 includes no provision allowing or authorizing an employer’s carrier to maliciously seek the arrest, incarceration, and felony prosecution of an employee for accepting workers’ compensation payments awarded to him by the Commission, and no such action is permitted by Key Risk’s insurance policy with Southern Fiber.

Wilson concerned a pre-trial UDTP complaint against both the insurer and the insured. 121 N.C. App. at 666, 468 S.E.2d at 498. By contrast, Plaintiff’s complaint in the instant action was filed against Key Risk—and not Southern Fiber—five years after the Opinion and Award was entered and left undisturbed on appeal, all while Key Risk continued to pay the benefits ordered thereunder and as required by its insurance contract with Southern Fiber. This case is therefore more akin to the UDTP action in *Murray*, which we held stated a viable claim. 123 N.C. App. at 16, 472 S.E.2d at 366.

4. Bad Faith and Civil Conspiracy

[5] Although we affirm the portion of the trial court’s order denying the dismissal of Plaintiff’s malicious prosecution, abuse of process, and UDTP claims, we are persuaded by Defendants’ challenges to Plaintiff’s bad faith and civil conspiracy claims. We address each claim in turn.

5. “By virtue of [N.C. Gen. Stat. § 97-98], once the employer has accepted an injury as compensable, benefits are ‘due and payable[.]’ ” *Moretz v. Richards & Assocs., Inc.*, 316 N.C. 539, 541, 342 S.E.2d 844, 846 (1986). Here, the Opinion and Award includes a finding of fact that “Plaintiff sustained an admittedly compensable injury by accident . . . Defendants accepted this claim . . .”

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A necessary element of a bad faith claim against an insurer is a refusal by the insurer to pay a valid claim. *Lovell v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 416, 420, 424 S.E.2d 181, 184 (1993). Plaintiff's complaint alleges no refusal to pay, and he acknowledges in his briefing that Key Risk "continued to pay his claim[.]" Though he argues that a bad faith claim "covers a wider variety of acts[] than simply failing to pay a legitimate claim," every case he cites concerns exactly that. *See, e.g., Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 116, 229 S.E.2d 297, 303 (1976) (noting that the tort exists to "deter refusals on the part of insurers to pay valid claims when the refusals are both unjustified and in bad faith"). Because Plaintiff has failed to plead a necessary element of this claim, we reverse this portion of the trial court's denial of Defendants' motion to dismiss.

[6] Like the bad faith claim, we also reverse the portion of the trial court's order denying dismissal of Plaintiff's civil conspiracy claim based on the intra-corporate immunity rule. The doctrine provides that, "because 'at least two persons must be present to form a conspiracy, a corporation cannot conspire with itself, just as an individual cannot conspire with himself.'" *Conleys Creek Ltd. P'ship. v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc.*, ___ N.C. App. ___, ___, 805 S.E.2d 147, 156 (2017) (quoting *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 184 N.C. App. 613, 625, 646 S.E.2d 790, 799 (2007), *rev'd on other grounds*, *State ex rel. Cooper*, 362 N.C. 431, 666 S.E.2d 107 (2008)). "[A]n allegation that a corporation is conspiring with its agents, officers or employees is tantamount to accusing a corporation of conspiring with itself[.]" *State ex rel. Cooper*, 184 N.C. App. at 625, 646 S.E.2d at 799, and is therefore insufficient to establish a claim for civil conspiracy. Here, Plaintiff asserts a civil conspiracy claim against Key Risk, several of its employees—all of whom were acting "in the course and scope of [their] employment" with Key Risk—and a private investigator hired by Key Risk. Nowhere in the complaint does Plaintiff allege that the various defendants conspired with anyone outside an employment or agent relationship with Key Risk. Nor does the complaint allege conduct outside of those employment or agency relationships.⁶ Because Plaintiff's complaint fails to allege a conspiracy with anyone outside of Key Risk,

6. We note that some jurisdictions provide for exceptions to intra-corporate immunity where: (1) the employees or agents possess an independent motive from their employer or principal; or (2) the alleged conspiratorial acts were taken outside the scope of the employment or agency. *See, e.g., Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 353 (4th Cir. 2013). We need not determine the applicability of these exceptions to the instant case, however, because Plaintiff's complaint is devoid of any allegations that would fall within them.

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its employees, and its agents, it fails to state a claim for which relief can be granted, and we reverse the trial court's order as to this claim.

5. Punitive Damages

[7] Finally, Defendants argue that we should reverse the trial court's order as to Plaintiff's punitive damages claim because his complaint should have been dismissed in its entirety. As set forth *supra*, however, we hold that Plaintiff has stated tort claims for malicious prosecution, abuse of process, and UDTP sufficient to survive Defendants' motion to dismiss. His allegations of fraudulent, malicious, and willful and wanton conduct on the part of Defendants in perpetrating those acts are sufficient to allege punitive damages within the meaning of Section 1D-15 of our General Statutes. N.C. Gen. Stat. § 1D-15 (2017); *see also, e.g., Horne v. Cumberland Cty Hosp. Sys., Inc.*, 228 N.C. App. 142, 150, 746 S.E.2d 13, 20 (2013) (affirming dismissal of a punitive damages claim where all substantive claims were also properly dismissed). We reject Defendants' argument.

III. CONCLUSION

Plaintiff's tort claims, although they pertain to a workers' compensation award, do not, as a matter of fact or law, "arise[] from an . . . insurer's processing and handling of a workers' compensation claim." Rather, Plaintiff's complaint arises out of a fraudulently and maliciously instituted criminal prosecution over which the Commission has no jurisdiction. Further, Plaintiff, as an injured employee who has obtained an award requiring payments to him under his employer's workers' compensation insurance policy is an intended third-party beneficiary of the policy in privity to bring a UDTP claim against the insurer. Plaintiff has sufficiently alleged claims for malicious prosecution, abuse of process, UDTP, and punitive damages; he has failed, however, to sufficiently allege claims for bad faith and civil conspiracy. For these reasons, we: (1) affirm the denial of Defendants' motion to dismiss all claims pursuant to Rule 12(b)(1); (2) affirm the denial of Defendants' motion pursuant to Rule 12(b)(6) as it pertains to Plaintiff's malicious prosecution, abuse of process, UDTP, and punitive damages claims; and (3) reverse the denial of Defendants' motion to dismiss pursuant to Rule 12(b)(6) as it pertains to Plaintiff's bad faith and civil conspiracy claims.

AFFIRMED IN PART; REVERSED IN PART.

Judges STROUD and DILLON concur.

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[261 N.C. App. 220 (2018)]

STATE OF NORTH CAROLINA

v.

CHARLES WARD AYERS

No. COA17-725

Filed 4 September 2018

1. Firearms and Other Weapons—discharging a firearm into an occupied vehicle—self-defense—jury instruction

The trial court was required to instruct the jury on self-defense in a trial for discharging a firearm into an occupied and operating vehicle, because the evidence gave rise to a reasonable inference that defendant was acting in self-defense when he shot the tire of a truck that was persistently tailgating him and had veered into his lane, forcing him past the edge of the pavement. Self-defense instructions are available in prosecutions for general intent crimes where the evidence shows intentional conduct by the perpetrator to commit the act, even if there is no intention to cause harm.

2. Firearms and Other Weapons—discharging a firearm into an occupied vehicle—self-defense—jury instruction—no duty to retreat

In a prosecution for discharging a firearm into an occupied vehicle arising from a defendant shooting the tire of an adjacent vehicle to prevent being run off the road, defendant was entitled to a jury instruction on self-defense, including language that defendant had no duty to retreat from a place where he had a lawful right to be, where the evidence showed that the aggressor motorist was persistently tailgating defendant's vehicle on a public road, he paced defendant's vehicle rather than passing when given the opportunity, and veered into defendant's lane, forcing him past the edge of the pavement.

Appeal by defendant from judgment entered 14 December 2018 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 20 March 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary Carla Babb, for the State.

Vitrano Law Offices, by Sean P. Vitrano, for defendant-appellant.

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TYSON, Judge.

Charles Ward Ayers (“Defendant”) appeals from his convictions for discharging a firearm into an occupied and operating vehicle and misdemeanor injury to personal property. On appeal, he contends the trial court: (1) erred by omitting his requested no-duty-to-retreat instruction from a jury instruction on self-defense; (2) committed plain error by failing to instruct the jury on his right to use non-deadly force in self-defense; and, (3) erred by failing to intervene *ex mero motu* to strike statements made by the prosecutor during closing argument. We vacate Defendant’s convictions and grant him a new trial.

I. Background

On 24 March 2015, Defendant was indicted by a grand jury for the offenses of discharging a firearm into an occupied and operating vehicle and injury to personal property. Defendant filed notice of his intent to offer evidence of self-defense at trial.

The evidence presented at trial tended to show that on the evening of 14 January 2015, Defendant, a U. S. Army veteran and disabled paratrooper, went to the Veterans Administration Hospital in Durham for treatment to address back pain. Defendant was there most of the day and was discharged from the hospital around 7 p.m. Defendant returned home by driving eastbound on Highway 98 between Durham and Wake Forest. Near an intersection with Olive Branch Road, a Chevrolet Silverado 1500 pickup truck pulled onto the roadway behind Defendant.

Defendant testified that the weather was cold and wet, as there had been a forecast of snow, but a persistent drizzle of rain fell instead. The roadway was dark as the sun had set and there were very few street lights.

[I]t’s an old style Carolina country road. You know, they didn’t level out the hills and they didn’t straighten out any of the curves, so it kind of meanders.

There’s not a lot of places to pass, but where they are, they’re short, you know. It’s not like you’ve got a half a mile worth of passing zone. Most of them, maybe if you have 300 yards for a pass, you’re lucky.

Defendant testified that when the truck pulled behind him onto Highway 98, two or three cars were traveling in front of him. At times the line of cars would slow down from 45 mph to below 30 mph. Defendant

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thought the drivers were cautious because of the weather, darkness and the potential for ice. When the cars in front of Defendant slowed down, Defendant slowed down, but the pickup truck behind him “would end up being pretty snug up on [his] rear bumper.” Defendant testified, “At sometimes he was, you know, maybe 50 feet behind me, but at sometimes he was like less than 5 feet.” Near the intersection of Highway 98 and Route 50, the only car still traveling in front of Defendant turned off.

The truck continued to follow Defendant for several miles, at times approaching within 5 feet of the rear of his vehicle. Before the intersection of Highway 98 and Route 50, the pickup truck tried to pass, but did not have enough room. After a second failed attempt, the truck began surging to within 10 to 15 inches of Defendant’s back bumper. Defendant eventually reached a downhill, 4-mile stretch of road with no oncoming traffic and ample room for the truck to pass. Defendant testified, “He rode my bumper all the way down that hill and all the way across the causeway and the lake, past the recycling center, and he could have passed me at any moment during that almost three-miles worth of driving.”

As they started going uphill, the truck pulled alongside Defendant as if to pass. Defendant braked, but the truck slowed too. “I realized he wasn’t passing me. He was *spacing* me.” (Emphasis supplied).

[T]hen he stepped on the gas, but he also pulled the wheel over and started to come in towards me. . . . And he’s basically, you know – his rear tire – if I’m sitting here and this is my driver’s side door, I could have reached out and touched the rear tire of his truck. That’s how close he was to me.

. . . .

I had reached down and I had grabbed the revolver out of the door pocket And I said, well, you know, if he forces me to a stop and he gets out of his vehicle, I’m going to make it clear to him before he approaches me that it’s not the right thing to do.

. . . .

So I had the pistol against my hip. I had put the window down. Now he starts pushing me off the road, and I’m like, “Oh, God, I’m going to roll” because the wheel started to shake. . . .

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Q. Had you been pushed off the road at some point?

A. My passenger side tires were in the mud. They were off the asphalt, at that point, and he was still pushing me further off. . . .

. . . .

And the car was really starting -- you know, the tires were digging into the mud on that side and my steering wheel was really starting to pull, and I knew that I was going to lose control of my car in the next second or two. I basically had no more time left to make a decision. I didn't want to hurt him. . . . I said, "Well you know what? I've got a tool in my hand. I don't have to hurt the guy. I can just disable the vehicle".

So what I did was, again, the window was all the way down, and so I literally went and fired directly into the tire at a downward angle, but straight through the side-wall, okay.

Q. How many times did you fire your --

A. Just one.

Upon firing at the truck's tire, Defendant heard a pop and some hissing and saw the back of the truck "shimmy." Defendant came back onto the roadway and stopped his vehicle. The pickup truck came to a safe stop in the middle of the roadway 40 to 60 feet ahead of Defendant. Defendant left the scene and went directly home.

The truck driver was Timothy Parker, a registered nurse, who was going home after work. Parker testified that while he was behind Defendant's vehicle on Highway 98, Defendant would slow down in the no passing zones and then accelerate to prevent Parker from passing him in the safe passing zones. When he did pull alongside Defendant to pass, Parker heard a pop and saw his vehicle's tire pressure warning light come on. "I put it together pretty quickly [that Defendant had shot my tire]." Parker pulled his vehicle over in the median, and made note of Defendant's license plate number as the other vehicle passed.

When law enforcement officers arrived at Defendant's home, he surrendered his firearm and told two Granville County deputies and Wake County Sheriff's Office Investigator Ashley Bledsoe what had happened.

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Defendant was indicted for discharging a firearm into an occupied and operating vehicle and misdemeanor injury to personal property on 24 March 2015. The case was tried before a jury beginning on 13 December 2016.

During the charge conference, the trial court stated it intended to give North Carolina Pattern Jury Instruction 308.45 on self-defense “without language about duty or lack of duty to retreat.” Defense counsel objected and requested the trial court to give an instruction that Defendant “has no duty to retreat in a place where the [D]efendant has a lawful right to be.” N.C.P.I. Crim. 308.45 (2016). The trial court declined to give the requested no-duty-to-retreat instruction.

Following the presentation of the evidence, the jury found Defendant guilty of discharging a firearm into an occupied and operating vehicle and injury to personal property. The trial court entered a consolidated judgment in accordance with the jury’s verdicts and sentenced Defendant to an active term of 51 to 74 months, then suspended the sentence and placed Defendant on supervised probation for a period of 36 months. Defendant appeals.

II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2017).

III. No Duty to Retreat

A. Trial Court’s Obligation to Instruct

[1] Defendant contends the trial court was obligated to give his requested jury instruction that he had no duty to retreat from where he had a lawful right to be when confronted with deadly force. “It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence.” *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988) (citation omitted).

A self-defense instruction is mandated when evidence is presented from which a jury could reasonably infer the defendant acted in self-defense. *State v. Allred*, 129 N.C. App. 232, 235, 498 S.E.2d 204, 206 (1998) (citation omitted). “In determining whether an instruction on . . . self-defense must be given, the evidence is to be viewed in the light most favorable to the defendant.” *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010) (citation omitted). N.C. Gen. Stat. § 14-51.3(a) states, in relevant part:

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A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, *a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be* if . . . the following applies:

(1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.

N.C. Gen. Stat. § 14-51.3(a) (2017) (emphasis supplied).

Self-defense is an affirmative defense, and “[a]n affirmative defense is one in which the defendant says, ‘I did the act charged in the indictment, but I should not be found guilty of the crime charged because * * *.’” *State v. Caddell*, 287 N.C. 266, 289, 215 S.E.2d 348, 363 (1975). Defendant clearly gave the State prior notice of his intent to affirmatively assert self-defense.

Defendant was charged with discharging a firearm into an occupied and operating vehicle and injury to personal property. Both of these offenses are general intent crimes. *See* N.C. Gen. Stat. § 14-160(a) (2017); *State v. Jones*, 339 N.C. 114, 148, 451 S.E.2d 826, 844 (1994) (“Discharging a firearm into a vehicle does not require that the State prove any specific intent but only that the defendant perform[ed] the act which is forbidden by statute. It is a general intent crime.” (citation omitted)).

By analogy, second-degree murder is also a general intent crime to which a defendant may be entitled to a self-defense instruction, even though the defendant did not intend to assault a victim with the intent to kill, but only the general intent to strike the blow. *See State v. Richardson*, 341 N.C. 585, 594-95, 461 S.E.2d 724, 730-31 (1995).

The defendant in *Richardson* was convicted of second-degree murder. *Id.* On appeal, the defendant claimed that the jury instruction on self-defense was misleading, since it suggested self-defense was only available if the jury determined the defendant had intended to kill, even though there was no such specific intent requirement to convict the defendant of second-degree murder. *Id.* Our Supreme Court stated that the instruction for self-defense did not mean that the defendant must have had the specific intent to kill the victim to be entitled to assert self-defense, but only that he had the intent to strike the victim with the blow which caused the death:

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Contrary to the Court of Appeals' decision, the language in the self-defense instruction does not read into the defense an "intent to kill" that is not an element of second-degree murder. A killing in self-defense involves an admitted, intentional act, as does second-degree murder. However, simply because defendant admitted intentionally committing an act resulting in death does not mean that defendant has admitted forming a specific "intent to kill."

....

The jury was thus instructed that second-degree murder involved an "intentional killing," but it was also specifically instructed that an intentional killing did not refer to the "presence of a specific intent to kill." The jury was instructed that defendant would be excused of committing second-degree murder if he "reasonably believed it was necessary to kill the victim in order to save himself from death or great bodily harm." There is no reason to suppose that the jury read the self-defense language to include as an element that defendant formed a "specific intent to kill" the victims. . . . Reviewing the instructions given to the jury, we conclude that the jury would not have interpreted the self-defense instruction to include a specific intent to kill, an element not necessary for a conviction of second-degree murder.

Id.

Our Supreme Court recently reaffirmed this principle in *State v. Lee*, in which it held a self-defense instruction was available for a defendant charged with second-degree murder, which does not require a specific intent to kill. 370 N.C. 671, 811 S.E.2d 563 (2018).

Although the Supreme Court has held a self-defense instruction is not available where the defendant claims the victim's death was an "accident," each of these cases involves facts where the defendant had testified he did not intend to strike the blow. For example, a self-defense instruction is not available where a defendant states he killed the victim because his gun accidentally discharged. *State v. Blankenship*, 320 N.C. 152, 154-55, 357 S.E.2d 357, 358-59 (1987). A self-defense instruction is not available when a defendant claims he was only firing a warning shot that was not intended to strike the victim. *State v. Cook*, ___ N.C. App. ___, ___, 802 S.E.2d 575, 577 (2017), *aff'd*, 370 N.C. 506, 809 S.E.2d 566 (2018). These line of cases are factually distinguishable from the

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present case and are not controlling, because it is undisputed Defendant intended to “strike the blow” and shoot Parker’s tire, even if he did not intend to kill Parker.

This Court held a self-defense instruction was warranted in *State v. Evans*, where the defendant was charged with discharging a firearm into an occupied vehicle. 19 N.C. App. 731, 734, 200 S.E.2d 213, 214 (1973). In *Evans*, the defendant’s evidence tended to show:

[the victim] had given defendant \$45.00 for which defendant was going to secure an eight-track tape player and some tape cartridges. Defendant had spent the \$45.00 on drugs and had not delivered the tape player. Defendant was told that [the victim] was looking for him and had a pistol. Defendant saw [the victim] parked across the street from defendant’s house with a pistol on the seat beside him. Defendant saw [the victim] return to the scene with either a shotgun or rifle. Defendant was afraid of [the victim] and fired a rifle at [the victim’s] vehicle to make him leave.

Id. at 733-34, 200 S.E.2d at 214.

The trial court had denied the defendant’s request for a self-defense instruction. *Id.* at 733, 200 S.E.2d at 214. Although the defendant had not intended to kill the victim when he fired upon his truck, this Court held the defendant was entitled to a self-defense instruction and remanded for a new trial. *Id.* at 734, 200 S.E.2d at 214.

The pattern jury instruction for discharging a firearm into an occupied vehicle in operation specifies the language “without justification or excuse” should be given, “where there is evidence of justification or excuse, such as self-defense.” N.C.P.I. Crim. 208.90D, fn. 2 (2017). Similarly, the pattern jury instruction for injury to personal property includes the language “defendant did this willfully and wantonly; that is, intentionally and *without justification or excuse*[.]” N.C.P.I. Crim. 223.15 (2017) (emphasis supplied).

As with the general intent crime of second-degree murder, these precedents and authorities show a self-defense instruction is available for both of the offenses Defendant was charged with, because he intended to shoot into Parker’s tire, even if he did not intend to kill Parker. See *Richardson*, 341 N.C. at 594-95, 461 S.E.2d at 730-31. Following *Evans* and *Richardson*, Defendant was not required to show he “intended to kill” Parker to warrant a self-defense instruction being given to the jury.

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Defendant needed only to have shown the intent to “strike the blow” and shoot at Parker’s vehicle.

B. Stand Your Ground

[2] Defendant was entitled to a self-defense instruction with no-duty-to-retreat language included. Viewed in the light most favorable to Defendant, the evidence shows Defendant was driving at night in wet conditions with a potential for ice, along a meandering two-lane public highway with few street lights. According to Defendant, Parker came up behind him and persistently tailgated Defendant’s vehicle with bright lights, while other traffic was traveling in front of him. Parker had an opportunity to pass Defendant, instead Parker pulled up alongside him. Defendant slowed down, Parker also slowed and “paced” him, rather than passing, and veered closer towards Defendant’s vehicle.

According to Defendant, Parker moved his vehicle into Defendant’s lane and was driving so close to his vehicle, Defendant could have reached out from his driver’s side window and touched Parker’s rear-passenger tire. Defendant’s vehicle’s passenger-side tires were both off the paved portion of the road on the muddy shoulder. Defendant stated he was afraid he would lose control, his vehicle would flip upside down, and he would be paralyzed.

Whether Defendant’s use of force under these circumstances was reasonable or excessive is clearly a question of fact to be determined by the jury upon proper instructions. *State v. Benge*, 272 N.C. 261, 264, 158 S.E.2d 70, 72 (1967) (“[T]he question of excessive force is to be determined by the jury.” (citation omitted)).

Defendant was present in a location he lawfully had a right to be: driving inside his vehicle upon a public highway. Defendant was under no legal obligation to stop, pull off the road, veer from his lane of travel, or to engage his brakes and risk endangering himself. *See* N.C. Gen. Stat. § 14-51.3(a).

Without the jury being instructed that Defendant had no duty to retreat from a place where he lawfully had a right to be, the jury could have determined, as the prosecutor argued in closing, that Defendant was under a legal obligation to cower and retreat. This notion would have required Defendant to have (1) further slowed down while being “paced,” (2) pulled off the road, or (3) ceased maintaining his lawful course of travel to avoid Parker’s use of his truck as a deadly weapon to force him off the road, in order to avoid criminal liability. *See State v. Jackson*, 74 N.C. App. 92, 95, 327 S.E.2d 270, 272 (1985) (“[A] motor

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vehicle may be a deadly weapon if used in a dangerous and reckless manner.” (citation omitted)).

Viewed in the light most favorable to Defendant, there is a “reasonable possibility that, had the trial court given the required stand-your-ground instruction [to the jury], a different result would have been reached at trial.” *Lee*, 370 N.C. at 676, 811 S.E.2d at 567. Defendant is entitled to a new trial with proper jury instructions on self-defense.

IV. Conclusion

Self-preservation is the most basic and fundamental natural right any individual possesses. The ability of an individual to protect and defend himself against force, and particularly deadly force, and to maintain one’s life and very existence against assertions of deadly force is essential to preserving life. *See State v. Holland*, 193 N.C. 713, 718 138 S.E. 8, 10 (1927) (“The first law of nature is that of self-defense. The law of this State and elsewhere recognizes this primary impulse and inherent right.”).

The trial court erred in failing to instruct the jury that Defendant had no duty to retreat. Defendant was entitled to a self-defense instruction, including language that Defendant had no duty to retreat or could defend and stand his ground where he was in a location where he had a “lawful right to be.” N.C. Gen. Stat. § 14-51.3(a). Defendant has shown a reasonable possibility the jury could have returned a different verdict had the trial court given the requested and statutorily mandated self-defense and no-duty-to-retreat instruction to the jury. *See id.*

In light of our award of a new trial, the remaining issues are moot and it is not necessary to address them. We reverse Defendant’s convictions and remand for a new trial with proper instructions. *It is so ordered.*

NEW TRIAL.

Judges BRYANT and ELMORE concur.

STATE v. CROOMS

[261 N.C. App. 230 (2018)]

STATE OF NORTH CAROLINA

v.

DEVON SHAMARK CROOMS, DEFENDANT

v.

AGENT ASSOCIATES INSURANCE, LLC, SURETY

No. COA17-640

Filed 4 September 2018

Bail and Pretrial Release—bond forfeiture—relief from final judgment—statutory requirements—statement of reasons and supporting evidence

The trial court erred in granting a surety relief from a bond forfeiture after a criminal defendant removed his ankle monitoring device and absconded during trial where the surety's motion was deficient under N.C.G.S. § 15A-544.8 because it failed to set forth evidence of extraordinary circumstances that would justify relief.

Appeal by Wilson County Board of Education from order entered 23 February 2017 by Judge Milton F. Fitch, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 16 November 2017.

No brief filed for the State, Defendant, or Surety.

Schwartz & Shaw, P.L.L.C., by Kristopher L. Caudle and Rebecca M. Williams, for Wilson County Board of Education, respondent-appellant.

BERGER, Judge.

The Wilson County Board of Education (“the Board”) appeals the February 23, 2017 order, which granted a petition for the remission of a bond forfeiture filed by Agent Associates Insurance, LLC (the “Surety”) through its bond agent Roland M. Loftin, Jr. (“Loftin”). The Board argues that the petition for remission did not provide statutorily required evidence to support the Surety's motion, and in partially granting the relief sought by the Surety, the trial court erred. We agree, and reverse the order of the trial court.

Factual and Procedural Background

In November 2015, Devon Shamark Crooms (“Defendant”) was on trial for being an accessory before the fact to murder. Prior to his

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trial, Defendant had been placed on pretrial release¹ through the Wilson County Sheriff's Department. As a condition of his release, Defendant was equipped with an electronic-monitoring device worn on his ankle. An individual with the Wilson County Sheriff's Department monitored the device and would receive an alert if it was tampered with or removed.

Defendant was present in court for his trial when the State presented its case in chief. After all evidence had been presented to the jury, and immediately following the charge conference, Defendant left the courtroom during the lunch recess on November 19, 2015. While out of the courtroom, Defendant removed his electronic-monitoring ankle bracelet and absconded. After Defendant failed to return for the remainder of the trial, it was completed in his absence. An order for Defendant's arrest was entered on the day he had absconded, and Defendant was eventually arrested near Miami, Florida.

As an additional condition for Defendant's pretrial release, bail had been set at \$50,000.00. To cover bail, Defendant paid \$1,400.00 of the \$3,000.00 premium to have a \$50,000.00 appearance bond issued by Loftin as bail agent for the Surety. Because Defendant had absconded from trial, the Wilson County Clerk of Court issued a Bond Forfeiture Notice on November 23, 2015.

Loftin testified at the hearing on his petition for remission of the bond forfeiture that after Defendant fled, Loftin went to great lengths to return Defendant into custody. Loftin testified that he had spent approximately \$80,000.00 and traveled as far as New Jersey in an attempt to find Defendant and return him to custody. Loftin filed a motion to set aside the bond forfeiture on March 7, 2016. On May 19, 2016, the motion was denied, and a final judgment of forfeiture of the \$50,000.00 bond was entered by the trial court and satisfied by the Surety.

On December 20, 2016, the Surety filed its Petition for Remission from Final Judgment of Forfeiture contending that there were extraordinary circumstances that would justify relief from the bond forfeiture. On February 23, 2017, the trial court found that extraordinary circumstances existed, and noted the following during the hearing on the petition:

In this particular case I see nothing that the bail agent did wrong up until the defendant had left court. He brought

1. Counsel for the Board failed to include in the record a standard AOC-CR-200 form describing the conditions of pretrial release for Defendant. There may have been other relevant conditions of pretrial release, and those stated herein are based on our review of the record and the transcript of the hearing.

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him to court every time he was scheduled to be in court. And even on this particular occasion he brought him to court and the man left after trial was in progress and the matter was ready to go to the jury.

Now a bail agent doesn't sit with a defendant seven days a week, 24 hours a day and does not have the ability to move that person in and out.

And in this particular case this individual was on a pretrial monitor and he walked away from the pretrial monitor as well as the bail agent. . . . [C]ertainly the sheriff would have gotten the first warning to be the first responder. Is not there equal, based on release, liability on the sheriff as also on the bail agent?

. . .

And in this particular case, because of the severity [of the offense], the agent never could have signed the bond if the person were not hooked up to a monitor. So then in that particular case, is there equal liability on the sheriff as well as the bail agent?

. . .

I mean isn't that the real reason that we even have pre-trial monitors? If not, if not, then all you got to do is just do away with the bail agents. Maybe that's the way we're going. Just hook everybody up to a monitor. And then if they run, then who does the School Board sue then?

. . .

[Factors to] consider are the diligence of the surety of staying abreast of the defendant's whereabouts prior to the date of appearance. Because he brought him here. He got him here. He came. Not one day. He came two days. And then three days. And then in the middle of the trial something happened and he didn't come back. They were in trial.

The trial court then ordered the Board to remit \$7,500.00 to the Surety.

The Board timely appeals, arguing that Surety's motion for relief did not comply with the requirements of N.C. Gen. Stat. § 15A-544.8, and

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thus, the trial court erred in granting Surety's motion for relief. We agree and reverse.

Analysis

The requirements for seeking and allowing relief from a final judgment of forfeiture are set forth by statute, and "[t]here is no relief from a final judgment of forfeiture except as provided in this section." N.C. Gen. Stat. § 15A-544.8(a) (2017). A court may grant relief from a final judgment of forfeiture only when "extraordinary circumstances exist that the court, in its discretion, determines should entitle that person to relief," or when notice was not properly given to the person seeking relief. N.C. Gen. Stat. § 15A-544.8(b).

For a party to obtain relief from a final judgment of forfeiture, Section 15A-544.8(c) sets forth the following procedure:

- (1) At any time before the expiration of three years after the date on which a judgment of forfeiture became final, any of the following parties named in the judgment may make a written motion for relief under this section:
 - a. The defendant.
 - b. Any surety.
 - c. A professional bondsman or a runner acting on behalf of a professional bondsman.
 - d. A bail agent acting on behalf of an insurance company.

The written motion shall state the reasons for the motion and set forth the evidence in support of each reason.

- (2) The motion shall be filed in the office of the clerk of superior court of the county in which the final judgment was, entered. The moving party shall, under G.S. 1A-1, Rule 5, serve a copy of the motion on the district attorney for that county and on the attorney for the county board of education.
- (3) A hearing on the motion shall be scheduled within a reasonable time in the trial division in which the defendant was bonded to appear.

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- (4) At the hearing the court may grant the party any relief from the judgment that the court considers appropriate, including the refund of all or a part of any money paid to satisfy the judgment.

N.C. Gen. Stat. § 15A-544.8(c) (emphasis added). In construing this Section, this Court's duty is "to carry out the intent of the legislature. As a cardinal principle of statutory interpretation, if the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *State v. Dunn*, 200 N.C. App. 606, 608-09, 685 S.E.2d 526, 528 (2009) (*purgandum*²).

Based upon the plain language of the statute, the motion for relief from the judgment of forfeiture was required to "state the reasons for the motion and set forth the evidence in support of each reason." N.C. Gen. Stat. § 15A-544.8(c)(1). The motion filed by the Surety seeking relief from the forfeiture merely alleged that "there were extraordinary circumstances . . . that would justify a relief under N.C. Gen. Stat. § 15A-544.8 from the bond forfeiture, said circumstances to be presented via affidavit and/or testimony at the hearing on this Motion." Beyond stating "extraordinary circumstances" as the reason for the motion, the Surety failed to comply with the statutory requirement to set forth evidence. Because of the deficiencies of the Surety's motion, the trial court had no grounds on which to grant the motion, and it should have been summarily denied. Therefore, this failure of the Surety to comply with the plain language of the statute compels us to reverse the order of the trial court.

REVERSED.

Judges HUNTER and INMAN concur.

2. Our shortening of the Latin phrase "*Lex purgandum est*." This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

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[261 N.C. App. 235 (2018)]

STATE OF NORTH CAROLINA

v.

DEMARKO DONIVAN DEGRAPHENREED

No. COA17-1377

Filed 4 September 2018

1. Search and Seizure—curtilage—reasonable expectation of privacy—location of car—on public street and outside of home’s fence

The trial court erred in its order denying defendant’s motion to suppress contraband found in his vehicle by concluding that the vehicle was parked in the curtilage of defendant’s home. The vehicle was parked on the side of a public street opposite the home and outside of the fence that surrounded the home—not in a place where defendant had a reasonable expectation of privacy.

2. Appeal and Error—preservation of issues—waiver—argument raised for first time on appeal

Defendant’s argument concerning a police K-9’s reliability was waived where he raised it for the first time on appeal.

3. Search and Seizure—warrantless searches—totality of the circumstances—vehicle

Police officers had probable cause to conduct a warrantless search of the trunk of defendant’s vehicle, which was parked on a public street, where a confidential reliable informant had made controlled purchases from defendant near the vehicle, defendant was in possession of the vehicle’s keys when officers executed a search warrant of his home, and a police K-9 alerted for narcotics next to the vehicle.

Appeal by defendant from judgment entered 21 March 2017 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 9 August 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John A. Payne, for the State.

Allegra Collins for defendant-appellant.

TYSON, Judge.

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Demarko Donovan Degraphenreed (“Defendant”) appeals the trial court’s denial of his motion to suppress evidence seized from a search of a vehicle. We affirm.

I. Background

Between January and March 2015, Winston-Salem police officers conducted a drug investigation of Defendant, including surveillance of Defendant’s residence located at 301 South Spring Street Unit-A, which is situated at the end of a dead-end street. During January 2015, a confidential police informant arranged over the telephone to meet with Defendant for the purpose of purchasing heroin. The confidential informant and Defendant purportedly agreed to meet at Defendant’s residence. Law enforcement officers provided the confidential informant with an unspecified amount of money to conduct a controlled purchase and observed the confidential informant enter Defendant’s residence. Afterwards, the confidential informant surrendered a quantity of heroin to the law enforcement officers, which the informant indicated he had purchased from Defendant.

A couple of months later, in March 2015, the same confidential informant conducted another controlled purchase of heroin at Defendant’s residence on behalf of law enforcement. The informant obtained a quantity of heroin, which he advised the law enforcement officers he had purchased from Defendant. During the course of the three month surveillance of Defendant’s residence, law enforcement officers observed the confidential informant purchase narcotics from Defendant at the trunk of a vehicle parked on the other side of the road from Defendant’s residence. The vehicle was a black 1985 Mercury Grand Marquis (the “Grand Marquis”). Law enforcement officers had observed the vehicle being regularly parked across from Defendant’s residence during the course of the three-month investigation.

Based upon the information obtained from the confidential informant, Winston-Salem Police Investigator Ashley Kimel applied for and was issued a search warrant for Defendant’s residence at 301 South Spring Street Unit-A on 13 March 2015. Neither Officer Kimel’s search warrant application nor the search warrant referenced the Grand Marquis vehicle.

Later on 13 March 2015, Officer Kimel, Officer Patrick McKaughan, and other law enforcement officers executed the search warrant for Defendant’s residence. Upon arriving at Defendant’s residence, Officer Kimel observed the Grand Marquis parked “adjacent from the residence, across the street.” Officer Kimel observed that two of the tires

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of the Grand Marquis were partially on the road way and the vehicle was parked parallel to Defendant's residence. There was no other residence on the side of the street the Grand Marquis was parked upon, but a parking lot and a commercial building is located there. Surrounding Defendant's residence was a seven-to-eight-foot-high chain link fence around the sides and back of Defendant's yard and a short wooden fence in the front of the residence.

When the officers executed the search warrant, Officer McKaughan entered Defendant's residence while Officer Kimel crossed the street and approached the Grand Marquis. Officer Kimel requested Officer McKaughan bring his police K-9, named Sassy, outside to sniff the Grand Marquis. Officer McKaughan had Sassy sniff the outside of the Grand Marquis, and the K-9 gave a positive alert for narcotics. Officer Kimel then went inside Defendant's residence to obtain the keys to the Grand Marquis. Another officer inside the residence, Detective Luper, informed Officer Kimel that Defendant had requested a key ring be placed inside his pocket. Officer Kimel retrieved the key ring from Defendant's pocket and found one of the keys located on the key ring unlocked the Grand Marquis.

Upon searching the Grand Marquis, the officers discovered inside the trunk a backpack containing Defendant's wallet, which contained Defendant's social security card and bank cards. Inside the backpack, officers also found a Smith & Wesson .38 caliber revolver, a Raven Arms .25 caliber handgun, a Taurus Millennium PT111 Pro 9mm handgun, two orange prescription pill bottles, one of which contained a plastic bag containing a substance that tested positive for heroin.

The backpack also contained a box of Browning .25 caliber auto ammunition, a digital scale, and a plastic bag containing MDMA and 30 tablets of oxycodone. After searching the VIN number of the Grand Marquis, Officer Kimel discovered the vehicle was registered to Defendant's girlfriend. The officers then arrested Defendant.

On 6 July 2015, Defendant was indicted for trafficking opium or heroin by possession, possession with intent to sell and deliver heroin, possession with intent to sell and deliver oxycodone, possession of a firearm by a felon, possession of marijuana, and possession of drug paraphernalia. On 27 January 2016, Defendant filed a motion to suppress the evidence seized from the search of the Grand Marquis. In his motion to suppress, Defendant asserted the evidence obtained from the Grand Marquis should be suppressed because no probable cause existed to search the vehicle and the search warrant for Defendant's residence did

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not refer to a vehicle. Following a hearing on Defendant's motion to suppress, the trial court orally denied Defendant's motion on 21 March 2016.

The trial court filed a written order (the "Order") denying Defendant's motion to suppress on 23 March 2017. Based upon its findings of fact, the trial court concluded "there was probable cause to search the trunk of the 1985 Grand Marquis."

On 21 March 2017, Defendant pled guilty to all charges, while expressly reserving the right to appeal the denial of his motion to suppress. Defendant was sentenced for trafficking opium or heroin by possession from 70 to 93 months imprisonment and ordered to pay a \$50,000 fine. On the charges for possession with intent to sell and deliver heroin, possession with intent to sell and deliver oxycodone, possession of a firearm by a felon, possession of marijuana, and possession of drug paraphernalia, Defendant was sentenced to 10 to 21 months imprisonment, to run concurrently with his sentence for trafficking opium or heroin by possession. Defendant filed timely notice of appeal.

II. Jurisdiction

Jurisdiction lies with this Court pursuant to N.C. Gen. Stat. §§ 15A-1444(e) (2017) and 15A-979(b) (2017).

III. Issues

Defendant asserts the trial court erred by denying his motion to suppress. He argues the police officers searched the Grand Marquis vehicle without a search warrant and without probable cause, in violation of the Fourth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment. U.S. Const. amend. XIV, § 1; *State v. Sanders*, 327 N.C. 319, 331, 395 S.E.2d 412, 420 (1990), *cert. denied*, 498 U.S. 1051, 112 L. Ed. 2d 782 (1991) ("The fourth amendment as applied to the states through the fourteenth amendment protects citizens from unlawful searches and seizures committed by the government or its agents." (citation omitted)).

Defendant argues, "the trial court's finding that the car was parked within the curtilage of Defendant's residence was unsupported by the evidence, and erroneous as a matter of law" and "the findings of fact which were supported by competent evidence did not support its conclusion of law that probable cause supported the search of the vehicle." Defendant also asserts, for the first time on appeal, the State failed to produce sufficient evidence of the K-9's reliability.

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IV. Standard of Review

The scope of this Court's review of a trial court's order denying a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Bone*, 354 N.C. 1, 7, 550 S.E.2d 482, 486 (2001) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)), *cert. denied*, 535 U.S. 940, 152 L.Ed.2d 231 (2002). The trial court's conclusions of law are reviewed *de novo*. *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993) (citation omitted).

"In reviewing the denial of a motion to suppress, we examine the evidence introduced at trial in the light most favorable to the State" *State v. Hunter*, 208 N.C. App. 506, 509, 703 S.E.2d 776, 779 (2010) (citation omitted).

V. Analysis*A. Curtilage*

[1] Regarding curtilage, the trial court concluded, in pertinent part:

16. The street in front of the residence is narrow and a dead end. The vehicle was routinely parked across the street, *in effect becoming part of the curtilage of the premises*, despite the house being surrounded by a fence. (Emphasis supplied).

17. Officer Kimel had probable cause to search the trunk of the Grand Marquis (*curtilage or not*) after the dog alerted. (Emphasis supplied).

Although the trial court labeled this determination as a finding of fact, the issue of whether an area is located within the curtilage of a home is a question of law. *See United States v. Dunn*, 480 U.S. 294, 301, 94 L.Ed.2d 326, 334-335 (1987) (establishing a four-factor legal test to determine the boundaries of a home's curtilage). The labels "findings of fact" and "conclusions of law" employed by the lower court in a written order do not determine the nature of our standard of appellate review. *See Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011) (reviewing what was labeled as a "conclusion of law" as a finding of fact). If the lower tribunal labels as a finding of fact what is in substance a conclusion of law, we review that "finding" as a conclusion *de novo*. *Id.*

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“The United States Supreme Court has . . . defined the curtilage of a private house as ‘a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept.’ ” *State v. Washington*, 134 N.C. App. 479, 483, 518 S.E.2d 14, 16 (1999) (quoting *Dow Chemical Co. v. United States*, 476 U.S. 227, 235, 90 L.Ed.2d 226, 235 (1986)).

“As a general rule, ‘if a search warrant validly describes the premises to be searched, a car [also located] on the premises may be searched even though the warrant contains no description of the car.’ ” *State v. Courtright*, 60 N.C. App. 247, 249, 298 S.E.2d 740, 742, *appeal dismissed and review denied*, 308 N.C. 192, 302 S.E.2d 245 (1983) (quoting *State v. Reid*, 286 N.C. 323, 326, 210 S.E.2d 422, 424 (1974)). “The premises of a dwelling house include, for search and seizure purposes, the area within the curtilage . . . ” *Id.* at 249, 298 S.E.2d at 742.

The State conceded at oral argument before this Court that the Grand Marquis was not located within the curtilage of Defendant’s residence. Nothing indicates Defendant had a reasonable expectation of privacy in the side of a public street opposite to his residence and outside of the confines of the fence surrounding the residence. The trial court’s conclusion of law, incorrectly labeled as a finding of fact, is erroneous as a matter of law that the Grand Marquis was “in effect” within the curtilage of Defendant’s residence when it was parked upon a public street.

Although the Grand Marquis was located and parked outside of the curtilage of the residence, this conclusion does not automatically warrant a reversal of the trial court’s order. The remainder of the trial court’s unchallenged findings of fact support its conclusion the police had probable cause to conduct the search of the Grand Marquis based upon: (1) the information relayed to police by the confidential informant; (2) police observation of the confidential informant and Defendant at the Grand Marquis; (3) Defendant having the keys to the Grand Marquis on his person when the search warrant was executed; (4) the K-9 sniff; and, (5) the motor vehicle exception to the Fourth Amendment.

B. Warrantless Searches

Here, the search warrant did not mention the Grand Marquis. “A warrantless search is lawful if probable cause exists to search and the exigencies of the situation make search without a warrant necessary.” *State v. Mills*, 104 N.C. App. 724, 730, 411 S.E.2d 193, 196 (1991) (citing *State v. Allison*, 298 N.C. 135, 141, 257 S.E.2d 417, 421 (1979)).

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“Probable cause exists where the facts and circumstances within their [the officers’] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” *State v. Downing*, 169 N.C. App. 790, 795, 613 S.E.2d 35, 39 (2005) (quotation and internal quotation marks omitted). “The existence of probable cause is a ‘commonsense, practical question’ that should be answered using a ‘totality-of-the-circumstances approach.’ ” *State v. McKinney*, 361 N.C. 53, 62, 637 S.E.2d 868, 874 (2006) (citing *Illinois v. Gates*, 462 U.S. 213, 230-31, 76 L. Ed. 2d 527, 543-44 (1983); *State v. Arrington*, 311 N.C. 633, 637, 319 S.E.2d 254, 257 (1984)).

“The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *United States v. Ross*, 456 U.S. 798, 825, 72 L. Ed. 2d 572, 594 (1982) (quotation marks and citation omitted).

An exception to the warrant requirement is the motor vehicle exception. *See id.*; *State v. Isleib*, 319 N.C. 634, 638-39, 356 S.E.2d 573, 576-77 (1987) (detailing the automobile exception to the Fourth Amendment’s warrant requirement).

“A warrant is not required to perform a lawful search of a vehicle on a public road when there is probable cause for the search.” *State v. Baublitz*, 172 N.C. App. 801, 808, 616 S.E.2d 615, 620 (2005) (citation omitted). Under the motor vehicle exception, “A police officer in the exercise of his duties may search an automobile without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile carries contraband materials.” *State v. Holmes*, 109 N.C. App. 615, 621, 428 S.E.2d 277, 280 (quotation marks, citation, and ellipses omitted), *disc. rev. denied*, 334 N.C. 166, 432 S.E.2d 367 (1993). “If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.” *Ross*, 456 U.S. at 825, 72 L. Ed. 2d at 594.

Concerning a confidential informant, this Court has previously held:

Information from a [confidential reliable informant] can form the probable cause to justify a search. *State v. Holmes*, 142 N.C. App. 614, 544 S.E.2d 18, *cert. denied*,

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353 N.C. 731, 551 S.E.2d 116 (2001). “In utilizing an informant’s tip, probable cause is determined using a ‘totality-of-the circumstances’ analysis which ‘permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant’s tip.’ ” *Holmes*, 142 N.C. App. 614, 621, 544 S.E.2d 18, 22 (2001) (quoting *State v. Earhart*, 134 N.C. App. 130, 133, 516 S.E.2d 883, 886 (1999)).

State v. Nixon, 160 N.C. App. 31, 37, 584 S.E.2d 820, 824 (2003).

The trial court’s order contains several findings of fact, which are based upon competent evidence in the record to which Defendant does not assign error, including:

2. A confidential and reliable informant (CI) had advised the police that a black male known as “Red” (later determined to be Defendant Demarko Degraphenreed) was selling and distributing heroin from 301 S. Spring Street.

3. The CI made monitored, controlled buys of heroin at that residence from Defendant Degraphenreed prior to issuance of the search warrant (January-March, 2015).

...

5. During each surveillance, the [Grand Marquis] was backed [into] its parked location, so officers could not view the license plate and ascertain registration/ownership.

6. The CI told officers that Defendant Degraphenreed utilized the vehicle.

7. During one of the CI’s purchases, officers observed Defendant Degraphenreed at the trunk of the [Grand Marquis].

...

12. The keys to the vehicle were on a key ring that was in a bedroom door. Defendant Degraphenreed asked officers in the house to put “his” keys in his pocket. Officer Kimel retrieved the keys to the vehicle from Defendant’s pocket.

Defendant does not assign error to these findings. These unchallenged findings are binding upon appeal. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (“[W]hen . . . the trial court’s findings of

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fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal.” (citation omitted)).

In addition, the search warrant for Defendant’s residence also expressly authorized the search of Defendant’s person. At the hearing on Defendant’s motion to suppress, Officer Kimel testified:

[Officer Kimel]: Detective Luper was standing by with Mr. Degraphenreed in Bedroom NO. 2, which was the child’s bedroom and requested the keys from Mr. Degraphenreed, which initially he advised the car did not belong to him. Detective Luper informed me that there were keys that were initially located in the doorknob to this bedroom, and that Mr. Degraphenreed had requested to have his keys, referring to these keys that were in that door be placed in his pocket. Detective Luper advised that he placed the keys in his pocket. And that is where I retrieved the keys from Mr. Degraphenreed and found that one of the keys that were on the key-ring belonged to that vehicle.

Defendant did not object to this testimony at the hearing and Defendant does not challenge the trial court’s finding of fact 12, which summarizes this testimony.

C. K-9’s Reliability

[2] Beyond the trial court’s “finding” that the Grand Marquis was within the curtilage, Defendant argues on appeal the reliability of the K-9 was not sufficiently established by the State to support the trial court’s conclusion the officers had probable cause to search the Grand Marquis, pursuant to *Florida v. Harris*, 568 U.S. 237, 240, 185 L. Ed. 2d 61 (2013). However, Defendant is raising the issue of the K-9’s reliability for the first time on appeal.

In Defendant’s written motion to suppress, the affidavit in support of his motion to suppress, and at the hearing on Defendant’s motion to suppress, Defendant only asserted and argued the search warrant not mentioning the Grand Marquis and the Grand Marquis being outside the curtilage of his residence as the reasons the officers did not have probable cause to search the Grand Marquis. At the hearing on the motion to suppress, the trial court and Defendant’s trial counsel had the following exchange:

THE COURT: I’ll hear from you in just a minute,
[Prosecutor].

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But [Defense Counsel], I wanted to give you an opportunity, if you wanted to comment. You know, I read the State v. Lowe during the break. I also read and was rereading Florida v. Harris, which is [a] United States Supreme court 9-0 opinion in 2013, that basically established that evidence of a dog's satisfactory performance in certification or training is sufficient reason to trust his alert. And then his alert is enough for probable cause.

So it really seems, that an argument can be made that despite the curtilage of the house, or what the search warrant covered, once the dog went out and sniffed the vehicle and alerted, then they had probable cause to search the vehicle. *But particularly, coupled with the knowledge that the vehicle had been present, that the CI had told them the Defendant had been by the trunk of the car.* But the alert of the dog kind of gave them probable cause to go in, it seems to me. But I don't know if you've read that case recently. (Emphasis supplied).

[Defense Counsel]: I'm not familiar with that case Judge but --

THE COURT: It's 568 U.S. I'm not sure of the number, but it was decided February 19th 2013.

[Defense Counsel]: But Judge, even from the dog sniff, if in fact that *only further strengthened* their probable cause at that point in time for a vehicle where they know that it is not his. They're bound to go get a search warrant in that situation to see if even more reason for them to go get a search warrant of that vehicle, compounded with the other factors in the case. They decided not to do that. And no exception applies, Judge, under this fact scenario. *I agree, dog sniff does allow for probable cause.* (Emphasis supplied).

Our appellate courts have repeatedly held a party may not assert a different theory on appeal, which was not raised before the trial court. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) ("This Court has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court.'") (citing *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)); *see also State*

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v. Benson, 323 N.C. 318, 321-22, 372 S.E.2d 517, 518-19 (1988) (holding defendant waived argument where defendant relied on one theory before trial as basis for written motion to suppress and then asserted another theory on appeal).

Defendant did not assert the K-9's purported lack of reliability as a basis for his motion to suppress before the trial court, and his trial counsel conceded a dog's sniff provides a basis for probable cause. Defendant's argument against the K-9's reliability is being raised for the first time on appeal and is waived. *See Sharpe*, 344 N.C. at 194, 473 S.E.2d at 5.

With regards to the K-9's open-air sniff, the trial court made the following relevant finding of fact:

11. Sassy performed a free air sniff of the Grand Marquis, gave a positive alert for narcotics and a further alert at the trunk of the vehicle.

Defendant does not contest the K-9 never alerted to the scent of narcotics or otherwise assign error to finding of fact 11. This Court has previously acknowledged that an open-air dog sniff does not constitute a search under the Fourth Amendment:

The United States Supreme Court discussed the Fourth Amendment implications of a canine sniff in *United States v. Place*, 462 U.S. 696, 77 L. Ed. 2d 110 (1983). There, the Court treated the sniff of a well-trained narcotics dog as *sui generis* because the sniff disclose[d] only the presence or absence of narcotics, a contraband item. *Id.* at 707, 77 L. Ed. 2d at 121. As the United States Supreme Court explained in *Illinois v. Caballes*, since there is no legitimate interest in possessing contraband, a police officer's use of a well-trained narcotics dog that reveals only the possession of narcotics does not compromise any legitimate privacy interest and does not violate the Fourth Amendment. 543 U.S. 405, 408-09, 160 L. Ed. 2d 842, 847 (2005).

State v. Washburn, 201 N.C. App. 93, 97, 685 S.E.2d 555, 558 (2009) (internal quotation marks omitted and alteration in original). The open-air sniff by the K-9, Sassy, at Officer McKaughan's direction did not constitute a "search" under the Fourth Amendment. *See id.*

The K-9's positive alert for narcotics at the Grand Marquis provided Officer Kimel with additional factors to find probable cause to conduct

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a warrantless search of the inside of the vehicle. “[A] positive alert for drugs by a specially trained drug dog gives probable cause to search the area or item where the dog alerts.” *Id.* at 100, 685 S.E.2d at 560. The K-9’s positive alert for narcotics within the Grand Marquis was “sufficient to support a reasonable belief that the automobile Carrie[d] contraband materials.” *Holmes*, 109 N.C. App. at 621, 428 S.E.2d at 280.

D. Probable Cause

[3] Based upon the totality of the circumstances, Officer Kimel had probable cause to search the trunk of the Grand Marquis. The trial court’s findings of fact reflecting: (1) the controlled purchases by the confidential reliable informant, during which times the Grand Marquis was always present; (2) the officers’ observation of a drug transaction taking place at the trunk of the Grand Marquis; (3) the Grand Marquis parked on a public street near Defendant’s residence during the officers’ investigation; (4) the Defendant’s possession of the keys to the Grand Marquis; and (5) the K-9’s positive alerts outside of the vehicle for the potential presence of narcotics, provide a reasonable, common-sense basis to support probable cause for the officers to believe narcotics were present inside the Grand Marquis. *See Nixon*, 160 N.C. App. at 37, 584 S.E.2d at 824 (“Information from a [confidential reliable informant] can form the probable cause to justify a search.” (citation omitted)); *Washburn*, 201 N.C. App. at 100, 685 S.E.2d at 560 (“a positive alert for drugs by a specially trained drug dog gives probable cause to search the area or item where the dog alerts”).

Based upon the automobile being located on a public road exception to the Fourth Amendment warrant requirement, probable cause justified the officers in conducting the warrantless search of the Grand Marquis. *See Baublitz*, 172 N.C. App. at 808, 616 S.E.2d at 620 (“A warrant is not required to perform a lawful search of a vehicle on a public road when there is probable cause for the search.” (citation omitted)).

Arguably, the officers had probable cause to search the Grand Marquis even without the K-9 sniff, based upon the controlled purchases by the confidential informant, the officers’ observation of Defendant and the confidential informant at the trunk of the Grand Marquis during a controlled purchase. *Nixon*, 160 N.C. App. at 37, 584 S.E.2d at 824. The K-9’s positive alerts for narcotics further supports the conclusion the officers had probable cause to search the Grand Marquis.

The trial court’s unchallenged findings of fact support the trial court’s conclusion Officer Kimel had probable cause to conduct a

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warrantless search of the trunk of the Grand Marquis. Defendant's arguments are overruled.

VI. Conclusion

The trial court misapprehended the law in concluding the Grand Marquis was parked within the curtilage of Defendant's residence. Defendant has waived the issue of the K-9's reliability by not raising the issue before the trial court. The trial court's remaining findings of fact support the trial court's conclusion Officer Kimel had probable cause to search the Grand Marquis, under the totality of the circumstances. The trial court's order denying Defendant's motion to suppress is affirmed. *It is so ordered.*

AFFIRMED.

Judges DIETZ and BERGER concur.

STATE OF NORTH CAROLINA

v.

AARON LEE GORDON, DEFENDANT

No. COA17-1077

Filed 4 September 2018

**Satellite-Based Monitoring—enrollment upon release from prison
—constitutionality as applied**

A trial court order enrolling defendant in satellite-based monitoring (SBM) upon his release from prison was unconstitutional as applied where his sentence consisted of 190 to 288 months in prison and lifetime sex-offender registration. Enrollment of an individual in North Carolina's SBM program constitutes a search for purposes of the Fourth Amendment and the State did not establish the circumstances necessary for the trial court to determine the reasonableness of a search fifteen to twenty years before its execution.

Judge DIETZ concurring.

Appeal by defendant from order entered 13 February 2017 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 22 March 2018.

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Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.

ZACHARY, Judge.

The trial court ordered Defendant Aaron Lee Gordon to enroll in lifetime satellite-based monitoring following his eventual release from prison. Defendant appeals. Because the State cannot establish at this time that Defendant's submission to satellite-based monitoring will constitute a reasonable Fourth Amendment search in the future, upon Defendant's release from prison, we vacate the trial court's civil order mandating satellite-based monitoring.

Background**I. Satellite-Based Monitoring**

Our General Assembly has described the legislative purpose of sex-offender registration programs as follows:

... the General Assembly recognizes that law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders who commit sex offenses or certain offenses against minors are impaired by the lack of information available to law enforcement agencies about convicted offenders who live within the agency's jurisdiction. . . .

Therefore, it is the purpose of this Article to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article.

N.C. Gen. Stat. § 14-208.5 (2017).

In furtherance of these objectives, the General Assembly enacted "a sex offender monitoring program that uses a continuous satellite-based

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monitoring system . . . designed to monitor” the locations of individuals who have been convicted of certain sex offenses. N.C. Gen. Stat. § 14-208.40(a) (2017). The present satellite-based monitoring program provides “[t]ime-correlated and continuous tracking of the geographic location of the subject using a global positioning system based on satellite and other location tracking technology.” N.C. Gen. Stat. § 14-208.40(c)(1) (2017). The reporting frequency of a subject’s location “may range from once a day (passive) to near real-time (active).” N.C. Gen. Stat. § 14-208.40(c)(2) (2017).

After determining that an individual falls within one of the three categories of offenders to whom the program applies, *see* N.C. Gen. Stat. § 14-208.40(a)(1)-(3), the trial court must conduct a hearing in order to determine the constitutionality of ordering the targeted individual to enroll in the satellite-based monitoring program. *Grady v. North Carolina*, 575 U.S. ___, ___, 191 L. Ed. 2d 459, 462 (2015) (“*Grady I*”); *State v. Blue*, ___ N.C. App. ___, ___, 783 S.E.2d 524, 527 (2016). The trial court may order a qualified individual to enroll in the satellite-based monitoring program during the initial sentencing phase pursuant to N.C. Gen. Stat. § 14-208.40A (2017), or at a later time during a “bring-back” hearing pursuant to § 14-208.40B (2017). For an individual ordered to enroll in the satellite-based monitoring program at the sentencing hearing, the monitoring begins after service of the individual’s active sentence.

II. Defendant’s Enrollment

In February 2017, Defendant pleaded guilty to statutory rape, second-degree rape, taking indecent liberties with a child, assault by strangulation, and first-degree kidnapping. Defendant was sentenced to 190 to 288 months’ imprisonment and lifetime sex-offender registration. The trial court also ordered, pursuant to N.C. Gen. Stat. § 14-208.40(a)(1) and § 14-208.6(1a), that Defendant enroll in the satellite-based monitoring program for the remainder of his natural life upon his release from prison.

The State’s only witness at Defendant’s satellite-based monitoring hearing was Donald Lambert, a probation and parole officer in the sex-offender unit. Lambert explained that the satellite-based monitoring device currently in use is “just basically like having a cell phone on your leg.” The device requires two hours of charging each day, which must occur while the device remains attached to Defendant’s leg. The charging cord is approximately eight to ten feet long. Defendant must also allow an officer to enter his home in order to inspect the device every 90 days.

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Lambert testified that under the current satellite-based monitoring program, the device is “monitoring where you’re going at all times[.]” Once Defendant is released from prison, “we [will] monitor [him] weekly. . . . [W]e just basically check the system to see his movement to see where he is, where he is going weekly. . . . [W]e review all the particular places daily where he’s been.” “[T]he report that can be generated from that tracking[] gives that movement on a minute-by-minute position,” as well as “the speed of movement at the time[.]” Under the current statutory regime, this information can be accessed at any time; no warrant is required. The monitoring system will also “immediately” alert the authorities if Defendant enters a restricted area, such as driving past a school zone. In the event that this were to happen, Lambert testified that “What we normally do is we contact [the enrollee] by phone immediately after they get the alert, ask where they are.”

Lambert was asked what Defendant would have to do if “he had a traveling sales job that covered, for instance, a regional area of Virginia, North Carolina and South Carolina?” Lambert explained that the sheriff’s office “would have to approve it.” Defendant would also “have to clear that with [the Raleigh office] as well. And then he would have to notify the state that he’s going to if he was going to—and have to decide whether or not he’d have to stay on satellite-based monitoring in another state.”

The State introduced Defendant’s Static-99 score at his satellite-based monitoring hearing. Lambert explained that Static-99 is “an assessment tool that they’ve been doing for years on male defendants over 18. It’s just a way to assess whether or not they’ll commit a crime again of this [sexual] sort.” Lambert testified that defendants are assigned “points” based on

whether or not they’ve committed a violent crime, whether or not there was an unrelated victim, whether or not there was—there’s male victims. . . . Other than just the sexual violence, was there another particular part of violence in the crime—in the index crime? Also, [it] does take their prior sentencing dates into factor too.

Defendant received a “moderate/low” score on his Static-99, which Lambert explained meant there was “a moderate to low [risk] that he would ever commit a crime like this again.” Defendant did not have any convictions for prior sex offenses, but he was given a point for having previous violent convictions. Based on Defendant’s Static-99 assessment, Lambert agreed that “it’s not likely he’s going to do that [commit

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a sex offense] again[.]” Other than Defendant’s Static-99 score, neither Lambert nor the State were able to offer “any evidence . . . as to what the rate of recidivism is during—even during [a] five-year period[.]”

The purpose of the satellite-based monitoring program is “to monitor subject offenders and correlate their movements to reported crime incidents.” N.C. Gen. Stat. § 14-208.40(d) (2017). However, Lambert also noted that the satellite-based monitoring program could potentially be of benefit to Defendant. As Lambert explained, “if somebody takes charges out, it will show where they are. So it kind of—it can help them as well, showing that they’ve been to particular places. If somebody says he was over here doing this at a particular time, it will—it will show, hey, no, he was over here.”

After reviewing the evidence presented during the hearing, the trial court recited the following:

Let the record reflect we’ve had this hearing, and the Court is going to find by the preponderance of the evidence that the factors that the State has set forth—his previous assaults, the Static-99 history, the fact that this occurred in an apartment with other children present as well and the relatively minor physical intrusion on the defendant to wear the device—it’s small. It has to be charged two hours a day. But other than that, it can be used in water and other daily activities—so I am going to find . . . that he should enroll in satellite-based monitoring for his natural life unless terminated.

Defendant filed proper notice of appeal from the trial court’s satellite-based monitoring order. On appeal, Defendant only challenges the constitutionality of the satellite-based monitoring order as applied to him. He argues that the trial court erred in ordering that he be subjected to lifetime satellite-based monitoring because “[t]he state failed to meet its burden of proving that imposing [satellite-based monitoring] on [Defendant] is reasonable under the Fourth Amendment.” We agree.

Standard of Review

A trial court’s determination that satellite-based monitoring is a reasonable search under the Fourth Amendment is reviewed *de novo*. *State v. Martin*, 223 N.C. App. 507, 508, 735 S.E.2d 238, 238 (2012) (citing *State v. Bare*, 197 N.C. App. 461, 464, 677 S.E.2d 518, 522 (2009), *disc. review denied*, 364 N.C. 436, 702 S.E.2d 492 (2010)). “Under a *de novo* review, the court considers the matter anew and freely substitutes

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its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citations and quotation marks omitted).

Discussion**I.**

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. A “search” will be found to have occurred so as to trigger Fourth Amendment protections where the government “physically occupie[s] private property for the purpose of obtaining information[.]” *United States v. Jones*, 565 U.S. 400, 404, 181 L. Ed. 2d 911, 918 (2012), or where government officers are shown to have “violate[d] a person’s ‘reasonable expectation of privacy[.]’ ” *Id.* at 406, 181 L. Ed. 2d at 919 (quoting *Katz v. United States*, 389 U.S. 347, 360, 19 L. Ed. 2d 576, 587 (1967)) (other citations omitted).

In *Grady I*, the United States Supreme Court held that enrollment of an individual in North Carolina’s satellite-based monitoring program constitutes a search for purposes of the Fourth Amendment. *Grady*, 575 U.S. at ___, 191 L. Ed. 2d at 461-62. In so concluding, the Supreme Court explained:

In *United States v. Jones*, we held that “the Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search.’ ” We stressed the importance of the fact that the Government had “physically occupied private property for the purpose of obtaining information.” Under such circumstances, it was not necessary to inquire about the target’s expectation of privacy in his vehicle’s movements in order to determine if a Fourth Amendment search had occurred. “Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred.”

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We reaffirmed this principle in *Florida v. Jardines*, [569 U.S. 1, 185 L. Ed. 2d 495] (2013)[.] . . . In light of these decisions, it follows that a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements.

Id. at ___, 191 L. Ed. 2d at 461-62 (quoting *Jones*, 565 U.S. at 404, 406 n.3, 181 L. Ed. 2d at 918, 919 n.3).

Nevertheless, the Supreme Court in *Grady I* made clear that its determination that the defendant had been subjected to a search was only the first step in the overall Fourth Amendment inquiry, noting that “[t]he Fourth Amendment prohibits only *unreasonable* searches.” *Id.* at ___, 191 L. Ed. 2d at 462. The Supreme Court explained that whether an individual's enrollment in the satellite-based monitoring program constitutes a reasonable Fourth Amendment search will “depend[] on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations.” *Id.* (citing *Samson v. California*, 547 U.S. 843, 165 L. Ed. 2d 250 (2006) and *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 132 L. Ed. 2d 564 (1995)). However, as our courts had not yet conducted that inquiry, the Supreme Court declined to “do so in the first instance.” *Id.* The Supreme Court concluded only that the satellite-based monitoring program constituted a search, leaving it to our courts to determine the “ultimate question of the program's constitutionality.” *Id.*

On remand from *Grady I*, this Court held that the defendant's enrollment in the satellite-based monitoring program was not a reasonable Fourth Amendment search.¹ *State v. Grady*, ___ N.C. App. ___, ___ S.E.2d ___, 2018 N.C. App. LEXIS 460 (“*Grady II*”). We noted that, notwithstanding the defendant's appreciably diminished expectation of privacy by virtue of his status as a convicted sex-offender, satellite-based monitoring was highly intrusive and unlike any other search the United States Supreme Court had upheld thus far. Despite the fact that satellite-based monitoring was “uniquely intrusive,” *id.* at *15, “the State failed to present any evidence of its need to monitor [the] defendant, or the procedures actually used to conduct such monitoring[.]” *Id.* at *21-22. Accordingly, we concluded that the State had failed to meet its burden of proving that satellite-based monitoring would constitute a reasonable

1. This Court reached a similar conclusion more recently in *State v. Griffin*, ___ N.C. App. ___, ___ S.E.2d ___, 2018 N.C. App. LEXIS 792.

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Fourth Amendment search under the totality of the circumstances. This was particularly so in light of the fact that “law enforcement is not required to obtain a warrant in order to access [the] defendant’s . . . location data.” *Id.* at *17. Indeed, it has long been “determined that ‘where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant.’” *Riley v. California*, ___ U.S. ___, ___, 189 L. Ed. 2d 430, 439 (2014) (quoting *Vernonia Sch. Dist. 47J*, 515 U.S. at 653, 132 L. Ed. 2d at 574).

II.

In the instant case, pursuant to the satellite-based monitoring statutes, the State submitted an application for the general authority to collect and access Defendant’s location information on a continuing basis. Defendant’s location information would be accessed in order to determine whether Defendant has traveled to a restricted area and, more broadly, to “correlate [his] movements to reported crime incidents.” N.C. Gen. Stat. § 14-208.40(c)(2), (d) (2017). This is in accordance with the underlying purpose of the satellite-based monitoring program, which is quite plainly “to discover evidence of criminal wrongdoing[.]” *Vernonia Sch. Dist. 47J*, 515 U.S. at 653, 132 L. Ed. 2d at 574.

The State filed its satellite-based monitoring application at the time of Defendant’s sentencing, pursuant to N.C. Gen. Stat. § 14-208.40A. Because of Defendant’s active sentence, the trial court’s order granting the State’s application will allow the State the authority to search Defendant—*i.e.*, to “physically occup[y] private property for the purpose of obtaining information”—beginning in 2032.² *Jones*, 565 U.S. at 404, 181 L. Ed. 2d at 918. Thus, in the instant case, Defendant has yet to be searched.

Nevertheless, solely by virtue of his status as a convicted sex-offender, the trial court’s order has vested in the State the authority to access the sum of Defendant’s private life once he is released from prison. *Grady II*, 2018 LEXIS 460, at *15-16 (quoting *Jones*, 565 U.S. at 415, 181 L. Ed. 2d at 925 (Sotomayor, J., concurring)) (“GPS monitoring generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about [his] familial, political, professional,

2. The trial court sentenced Defendant to 190 to 288 months’ imprisonment. Defendant was given credit for 426 days spent in confinement prior to the date judgment was entered against him in February 2017.

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religious, and sexual associations.’ [T]hrough analysis of [satellite-based monitoring] location data, the State could ascertain whether an offender was regularly visiting a doctor’s office, an ABC store, or a place of worship.”). Lambert testified that pursuant to the satellite-based monitoring order, his office will “monitor [Defendant] weekly. . . . [W]e just basically check the system to see his movement to see where he is, where he is going weekly. . . . [W]e review all the particular places daily where he’s been.” Neither the State’s application nor the trial court’s order place limitations on the State’s ability to access this information. The trial court’s order resembles, in essence, a general warrant.

A “general warrant” has traditionally been described as one “that gives a law-enforcement officer broad authority to search and seize unspecified places or persons; a . . . warrant that lacks a sufficiently particularized description of the . . . place to be searched.” *General Warrant*, BLACK’S LAW DICTIONARY (8th ed. 2014). General warrants also include those that are not “supported by showings of probable cause that any particular crime ha[s] been committed.” *State v. Richards*, 294 N.C. 474, 491-92, 242 S.E.2d 844, 855 (1978) (citations omitted). In other words, general warrants are “not limited in scope and application.” *Maryland v. King*, 569 U.S. 435, 466, 186 L. Ed. 2d 1, 32 (2013) (Scalia, J., dissenting). It is in the context of a warrant to search, however, that the State must make a proper showing of individualized suspicion and abide by “[t]he requirements of particularity of descriptions[,]” which are met only “when the warrant on its face leaves nothing to the discretion of the officer executing the warrant as to the premises to be searched and the activities or items which are the subjects of the proposed search.” *Brooks v. Taylor Tobacco Enters., Inc.*, 298 N.C. 759, 762, 260 S.E.2d 419, 422 (1979) (citation omitted); *Richards*, 294 N.C. at 491-92, 242 S.E.2d at 855. The requirements of individualized suspicion and particularity operate precisely to prevent the government’s use of general warrants—as our Supreme Court has noted, general warrants have been “abhorred since colonial days and [are] banned by both the Federal and State Constitutions.” *Richards*, 294 N.C. at 491, 242 S.E.2d at 855 (citation and quotation marks omitted).

The satellite-based monitoring program grants a similarly expansive authority to State officials. State officials have the ability to access the details of a monitored defendant’s private life whenever they see fit. A defendant’s trip to a therapist, a church, or a family barbecue are revealed in the same manner as an unauthorized trip to an elementary school. At no point are officials required to proffer a suspicion or exigency upon which their searches are based or to submit to judicial oversight. Rather,

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the extent of the State's ability to rummage through a defendant's private life are left largely to the searching official's discretion, constrained only by his or her will. *See, e.g., State v. White*, 322 N.C. 770, 774, 370 S.E.2d 390, 393 (1988) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 29 L. Ed. 2d 564, 583 (1971)) ("The second, distinct objective [of the warrant requirement] is that those searches deemed necessary should be as limited as possible. Here, the specific evil is the "general warrant" abhorred by the colonists, and the problem is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings.'"). Thus, it is all the more critical that the State meet the requirement of otherwise showing the *reasonableness* of the satellite-based monitoring search.

This Court will not exhibit a more generous faith in our government's benign use of general warrants than did the Founders. In the Declaration of Rights of the North Carolina Constitution, the use of general warrants is explicitly condemned as "dangerous to liberty" and the Constitution mandates that general warrants "shall not be granted." N.C. Const. art. I, § 20. The Framers of the Fourth Amendment to the United States Constitution sought to prevent the use of general warrants as well. *See Payton v. New York*, 445 U.S. 573, 583, 63 L. Ed. 2d 639, 649 (1980) ("It is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment."); *see also* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 590 (1999) ("[The Framers] were concerned about a specific vulnerability in the protections provided by the common law; they were concerned that legislation might make general warrants legal in the future, and thus undermine the right of security in person and house. Thus, the framers adopted constitutional search and seizure provisions with the precise aim of ensuring the protection of person and house by prohibiting legislative approval of general warrants."). As pointed out in an unrelated case by Justice Newby of our Supreme Court, "the purpose of the Fourth Amendment is to impose a standard of reasonableness upon the exercise of discretion by governmental officials . . . in order to safeguard the privacy and security of individuals against arbitrary invasions[.]" *State v. Heien*, 366 N.C. 271, 278-279, 737 S.E.2d 351, 356 (2012) (citation and quotation marks omitted).

Given the unlimited and unfettered discretion afforded to State officials with the satellite-based monitoring system, the State's burden of establishing that the use of satellite-based monitoring will comply with

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the Fourth Amendment's demand that all searches be "reasonable" is especially weighty.³

III.

In the case at bar, the State has failed to meet its burden of showing that the implementation of satellite-based monitoring of this Defendant will be reasonable notwithstanding the level of discretion afforded. That is, the State has not established the circumstances necessary for this Court to determine the reasonableness of a search fifteen to twenty years before its execution.⁴

We note that because the stated purpose of the satellite-based monitoring program is to discover evidence of criminal wrongdoing, Defendant's enrollment in that program cannot be said to be reasonable in light of the "special needs" exception to the warrant requirement, *Vernonia Sch. Dist. 47J*, 515 U.S. at 652-53, 132 L. Ed. 2d at 574, nor does the State argue such to be the case. Rather, if Defendant's continuous location accessing can be constitutional absent proper prior

3. "The[] words [of the Fourth Amendment] are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure . . . ' from intrusion . . . by officers acting under the unbridled authority of a general warrant. Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws. They were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed 'the liberty of every man in the hands of every petty officer.' The historic occasion of that denunciation, in 1761 at Boston, has been characterized as 'perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. "Then and there," said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." ' " *Stanford v. Texas*, 379 U.S. 476, 481-82, 13 L. Ed. 2d 431, 435 (1965) (quoting *Boyd v. United States*, 116 U.S. 616, 625, 29 L. Ed. 746, 749 (1886)).

4. The merits of this issue have not yet come before this Court. To date, we have only assessed the reasonableness of a satellite-based monitoring order at the time the defendant had already been subjected to monitoring. *Grady II*, 2018 N.C. App. LEXIS 460; *Griffin*, 2018 N.C. App. LEXIS 792. This case presents the Court's first analysis of the constitutionality of an order enrolling a defendant in the satellite-based monitoring program several years prior to the time at which that monitoring is expected to begin. *E.g.*, *State v. Greene*, ___ N.C. App. ___, 806 S.E.2d 343 (2017) (unnecessary to address the constitutionality of the trial court's satellite-based monitoring order because the State conceded that the evidence presented was insufficient to establish that the search was reasonable); *State v. Johnson*, ___ N.C. App. ___, 801 S.E.2d 123 (2017) (remanding the satellite-based monitoring order because the trial court did not conduct the appropriate reasonableness inquiry below).

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judicial approval, it must be in light of its reasonableness pursuant to a general balancing approach. *See, e.g., Samson, supra*. That analysis ordinarily involves an examination of the circumstances existing at the time of the search, including “the nature of the privacy interest upon which the search . . . intrudes”; “the character of the intrusion” itself and “the information it discloses”; as well as “the nature and immediacy of the governmental concern at issue . . . and the efficacy of th[e] means for meeting it.” *Vernonia Sch. Dist. 47J*, 515 U.S. at 654, 658, 660, 132 L. Ed. 2d at 575, 577, 578, 579.

This Court was able to determine the reasonableness of the trial court’s satellite-based monitoring orders in *Grady II* and *Griffin* because the defendants had already become subject to the monitoring at the time of our analyses. In *Grady II*, the trial court ordered the defendant to enroll in satellite-based monitoring at a “bring-back” hearing pursuant to N.C. Gen. Stat. § 14-208.40B, “more than three years after” the defendant’s release. *Grady II*, 2018 LEXIS 460, at *11. We could thus examine the totality of the circumstances in order to determine the reasonableness of subjecting the defendant to satellite-based monitoring. For example, we considered the characteristics of the monitoring device that was currently in use; the manner in which the defendant’s location monitoring was conducted as well as the purpose for which that information was used under the current statute; and the State’s interest in monitoring that particular defendant in light of his “current threat of reoffending[.]” *Id.* at *13, 17. Based on these circumstances, we concluded that “the State failed to prove, by a preponderance of the evidence, that lifetime [satellite-based monitoring] of [the] defendant is a reasonable search under the Fourth Amendment.” *Id.* at *22. Similarly, in *Griffin*, the “[d]efendant was instructed to appear for a ‘bring-back’ hearing to determine whether he would be required to participate in [the satellite-based monitoring] program.” *Griffin*, 2018 N.C. App. LEXIS 792, at *2. At the hearing, the trial court “‘weighed the Fourth Amendment right of the defendant to be free from unreasonable searches and seizures with the public[sic] right to be protected from sex offenders and . . . conclude[d] that the public[sic] right of protection outweigh[ed] the “de minimis” intrusion upon the defendant’s Fourth Amendment rights.’” *Id.* at *5. However, on appeal, this Court noted that “unless [satellite-based monitoring] is found to be effective to actually serve the purpose of protecting against recidivism by sex offenders, it is impossible for the State to justify the intrusion of continuously tracking an offender’s location for any length of time, much less for thirty years.” *Id.* at *11-12. We therefore concluded that “absent any evidence that satellite-based monitoring . . . is effective to protect the public from sex offenders, the trial

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court erred in imposing [satellite-based monitoring] on [the defendant] for thirty years.” *Id.* at *1.

In the instant case, the State’s ability to establish reasonableness is further hampered by the lack of knowledge concerning the future circumstances relevant to that analysis. For instance, we are not yet privy to “the invasion which the search [will] entail[.]” *Terry v. Ohio*, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 905 (1968) (alteration omitted) (citation and quotation marks omitted). The State makes no attempt to report the level of intrusion as to the information revealed under the satellite-based monitoring program, nor has it established that the nature and extent of the monitoring that is currently administered, and upon which the present order is based, will remain unchanged by the time Defendant becomes subjected to the monitoring. *Cf. Vernonia Sch. Dist. 47J*, 515 U.S. at 658, 132 L. Ed. 2d at 578 (“[I]t is significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic. . . . And finally, the results of the tests . . . are not turned over to law enforcement authorities or used for any internal disciplinary function.”) (citations omitted). Instead, the State’s argument focuses primarily on the “limited impact” of the monitoring device itself. The State, however, provides no indication that the monitoring device currently in use will be similar to that which may be used some fifteen to twenty years in the future. *See State v. Spinks*, ___ N.C. App. ___, ___, 808 S.E.2d 350, 361 (2017) (Stroud, J., concurring) (citing *Riley*, ___ U.S. at ___, 189 L. Ed. 2d at 446-47) (“The United States Supreme Court has recognized in recent cases the need to consider how modern technology works as part of analysis of the reasonableness of searches.”). Nor does the record before this Court reveal whether Defendant will be on supervised or unsupervised release at the time his monitoring is set to begin, affecting Defendant’s privacy expectations in the wealth of information currently exposed. *Samson*, 547 U.S. at 850-52, 165 L. Ed. 2d at 258-59; *Grady II*, 2018 LEXIS 460, at *11 (“Defendant is an unsupervised offender. He is not on probation or supervised release[.] . . . Solely by virtue of his legal status, then, it would seem that defendant has a greater expectation of privacy than a supervised offender.”); *see also Vernonia Sch. Dist. 47J*, 515 U.S. at 654, 132 L. Ed. 2d at 575 (“[T]he legitimacy of certain privacy expectations vis-à-vis the State may depend upon the individual’s legal relationship with the State.”).

The State has also been unable at this point to adequately establish—on the other side of the reasonableness balance—the government’s “need to search[.]” *Terry*, 392 U.S. at 21, 20 L. Ed. 2d at 905 (citation and quotation marks omitted). The State asserts only that “[i]f, as Defendant

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acknowledges, the State has ‘a substantial interest in preventing sexual assaults,’ then the State’s evidence amply demonstrated that Defendant warranted such concern in the future despite his STATIC-99 risk assessment score.” However, the State makes no attempt to distinguish this interest from “ ‘the normal need for law enforcement[.]’ ” *State v. Elder*, 368 N.C. 70, 74, 773 S.E.2d 51, 54 (2015) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873, 97 L. Ed. 2d 709, 717 (1987)); *see also King*, 569 U.S. at 481, 186 L. Ed. 2d at 41 (Scalia, J., dissenting) (“Solving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches. *The Fourth Amendment must prevail.*”) (emphasis added). In addition, to the extent that the current satellite-based monitoring program is justified by the State’s purpose of deterring future sexual assaults, the State’s evidence falls short of demonstrating what Defendant’s threat of recidivating will be after having been incarcerated for roughly fifteen years.⁵ *E.g.*, *Brown v. Peyton*, 437 F.2d 1228, 1230 (4th Cir. 1971) (“One of the principal purposes of incarceration is rehabilitation[.]”). The only individualized measure of Defendant’s threat of reoffending was the Static-99, which the State’s witness characterized as indicating that Defendant was “not likely” to recidivate. Lambert, the State’s only witness, was asked “what, if any, information do you have that would forecast—besides the Static-99, which would seem to indicate [Defendant] has no real likelihood of recidivism here, do you have any other evidence that would indicate the reason that the State of North Carolina would need to search his location or whereabouts on a regular basis?” Lambert responded, “I don’t have any information on that[.]”

Without reference to the relevant circumstances that must be considered, the State has not met its burden of establishing that it would otherwise be reasonable to grant authorities unlimited discretion in searching—or “obtaining”—Defendant’s location information upon his release from prison. *Jones*, 565 U.S. at 404, 181 L. Ed. 2d at 918. Authorizing the State to conduct a search of this magnitude fifteen to twenty years in the future based solely upon scant references to present circumstances would defeat the Fourth Amendment’s requirement of circumstantial reasonableness altogether.

5. We are cognizant of the fact that Defendant’s Static-99 score was based in part upon his age at the likely time of release. However, this factor takes into account only Defendant’s age, and not how long he will be incarcerated or his potential for rehabilitation while incarcerated.

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Nevertheless, our concurring colleague urges that our holding today “imposes a burden on the State to predict the future.” This is not the case. It is the Fourth Amendment that imposes a burden on the State to establish the reasonableness of its searches, and an individualized determination of reasonableness in time, place, and manner is a routine duty of judges. Our General Assembly in the instant case has tasked the State, pursuant to N.C. Gen. Stat. § 14-208.40A, with meeting that burden decades in the future. As “an error-correcting body, not a policy-making or law-making one[.]” *Fagundes v. Ammons Dev. Grp., Inc.*, ___ N.C. App. ___, ___, 796 S.E.2d 529, 533 (2017) (citation and quotation marks omitted), we are constrained to follow precedent and statutes as written, and not as we might wish them to be. Moreover, we do not hold that it is not possible for the State to meet this challenge. Rather, our holding is simply that, in the case at bar, the State has failed to do so.

Conclusion

It may be that the trial court’s order would be reasonable in the year 2032. The State, however, has failed to establish that to be the case. Accordingly, we necessarily conclude that the trial court’s order enrolling Defendant in the satellite-based monitoring program upon his eventual release from prison is unconstitutional as applied to him. We therefore vacate the trial court’s order. Because the instant case is the first in which this Court has addressed the merits of the reasonableness of an order entered pursuant to N.C. Gen. Stat. § 14-208.40A, we remand with instructions for the trial court to dismiss the State’s application for satellite-based monitoring without prejudice to the State’s ability to reapply. *Cf. State v. Greene*, ___ N.C. App. ___, 806 S.E.2d 343 (2017).

VACATED AND REMANDED.

Judge HUNTER, JR. concurs.

Judge DIETZ concurring in the judgment by separate opinion.

DIETZ, Judge, concurring in the judgment.

I agree with the majority that this case is controlled by our recent decisions in *State v. Griffin*, ___ N.C. App. ___, __ S.E.2d ___, 2018 N.C. App. LEXIS 792 (2018), and *State v. Grady*, ___ N.C. App. ___, __ S.E.2d ___, 2018 N.C. App. LEXIS 460 (2018) (*Grady II*). Under this precedent, the State failed to meet its burden to justify satellite-based monitoring in this case.

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I cannot join the majority's decision to expand the reasoning of *Griffin* and *Grady II* to require the State to address future, speculative facts that do not exist today. That portion of the majority's holding renders our State's satellite-based monitoring program unconstitutional in virtually every future case. This is so because the statute requires the State to conduct the initial satellite-based monitoring hearing at the time of criminal sentencing. N.C. Gen. Stat. § 14-208.40A.

Satellite-based monitoring is imposed on offenders who commit heinous crimes such as child sex offenses and sexually violent offenses. N.C. Gen. Stat. §§ 14-208.40, 14-208.6(4). These are not offenders who expect to be sentenced to time served or immediately released on probation. Thus, in the vast majority of satellite-based monitoring cases, the offender will first serve time in prison before being released and subjected to monitoring.

I disagree with the majority's view that the State must divine all the possible future events that might occur over the ten or twenty years that the offender sits in prison and then prove that satellite-based monitoring will be reasonable in every one of those alternate future realities. That is an impossible burden and one that the State will never satisfy.

Those convicted of crimes, "especially very serious crimes such as sexual offenses against minors, and especially very serious crimes that have high rates of recidivism such as sex crimes, have a diminished *reasonable* constitutionally protected expectation of privacy." *Belleau v. Wall*, 811 F.3d 929, 936 (7th Cir. 2016). In my view, if the State can show, based on the facts that exist today, that a convicted sex offender is so dangerous to society that satellite-based monitoring will be necessary to protect the public upon that offender's release, then imposition of monitoring—even if it will not occur until some future time—can withstand constitutional scrutiny. After all, if facts change in the ways the majority speculates—the offender becomes disabled; technology radically changes; society becomes less tolerant of government monitoring of convicted sex offenders—the defendant can assert a *Grady* challenge at that time and the State will bear the burden of showing reasonableness based on those new facts.

The majority instead imposes a burden on the State to predict the future. The Fourth Amendment does not require that level of clairvoyance. I believe society is prepared to accept as reasonable the imposition of future satellite-based monitoring on dangerous convicted sex offenders when the State has shown, based on the facts known today, that those offenders likely will pose a threat to society upon their release—particularly when those offenders can challenge the reasonableness of that monitoring if the facts change.

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STATE OF NORTH CAROLINA

v.

CHARLES T. MATHIS, DEFENDANT

No. COA17-1302

Filed 4 September 2018

1. Indictment and Information—unlawfully accessing government computer—sufficiency of indictment

An indictment against a bail bondsman for unlawfully accessing a government computer was sufficient even though defendant contended that his inadvertent failure to accurately report his transactions could not be considered intentional because the State compelled him to complete and submit monthly reports. That argument had no bearing on the validity of the indictment.

2. Crimes, Other—unlawfully accessing government computer—direct or indirect—submission of bail bond reports

The trial court did not err by denying a bail bondsman's motion to dismiss charges for unauthorized access to a government computer under N.C.G.S. § 14-454.1 deriving from submission of reports to the State. While defendant had authorization to use the system, defendant exceeded that authorization by inputting fraudulent information. Moreover, even if defendant did not directly enter the questioned reports, his conduct comes within the plain language of the statute which includes the phrases "access or cause to be accessed" and "directly or indirectly."

3. Appeal and Error—preservation of issues—double jeopardy—not raised below

Defendant failed to preserve the issue of double jeopardy in being charged with false pretenses and unlawfully accessing a government computer where he based his argument on a civil action resulting in the revocation of his bail bonds license and did not bring forth an argument about a lesser included offense. The trial court did not make a determination on this issue.

4. Crimes, Other—monthly bail bond reports—falsification—sufficiency of evidence

The trial court did not err by denying a bail bondsman's motion to dismiss a charge that he violated N.C.G.S. § 58-71-165 by submitting his required reports to the State with omissions. Although defendant contended that the omissions were clerical errors committed by staff, the State presented evidence of false reports, of

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defendant signing the attestation clause, and of the reports being filed. Whether the omissions were fraudulent or clerical errors were issues of fact to be determined by the jury.

5. False Pretense—obtaining something of value—bail bond license—causation with false representation

The trial court erred by denying a bail bondsman's motion to dismiss an obtaining property by false pretenses charge arising from his submission of computerized reports to the State. Defendant already had his bail bondsman's license; while the State likens obtaining to retaining, retain is not within the definition of obtain. The Department of Insurance has different processes and requirements for the two, and the assertion that defendant obtained a renewal is not what the State alleged in the indictment.

6. Evidence—false pretense in obtaining bail bond license—selective prosecution—questioning of former insurance commissioner limited

The trial court did not erroneously limit questioning of a former insurance commissioner by a bail bondsman accused of obtaining property (his license) by false representations. The trial court directed defendant, who appeared pro se and alleged selective prosecution, to ask questions which would bring forth relevant testimony and then allowed defendant to ask several more questions of the witness.

7. Criminal Law—selective prosecution—prima facie showing—false pretenses—bail bond license

A bail bondsman charged with obtaining his license by false pretenses through false reports did not make a prima facie showing of selective prosecution. The testimony defendant elicited did not, as he contended, show a lack of prosecution of bail bondsmen for filing false reports.

Appeal by Defendant from judgment entered 18 July 2017 by Judge Martin B. McGee in Union County Superior Court. Heard in the Court of Appeals 6 June 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel Snipes Johnson, for the State.

Thomas Law, P.A., by Albert S. Thomas, Jr. and Catherine T. Andrews, and Narron & Holdford, P.A., by I. Joe Ivey, for defendant-appellant.

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HUNTER, JR., Robert N., Judge.

Charles T. Mathis (“Defendant”) appeals following jury verdicts convicting him of obtaining property by false pretenses, falsification of monthly bail bond report information, and unlawfully accessing a government computer. On appeal, Defendant brings forth the following arguments: (1) the indictment charging him for unlawfully accessing a government computer was fatally defective; (2) the trial court erred in denying his motion to dismiss the unlawfully accessing a government computer charge; (3) the indictments for unlawfully accessing a government computer and obtaining property by false pretenses infringe his constitutional right to avoid double jeopardy; (4) the trial court erred in denying his motion to dismiss the falsifying bail bond report information and obtaining property by false pretenses charges; and (5) the State violated his constitutional right of equal protection by selectively prosecuting him. We find no error in part, dismiss in part, reverse in part, and remand for resentencing.

I. Factual and Procedural Background

On 1 June 2015, a Union County Grand Jury indicted Defendant for unlawfully accessing a government computer, falsification of bail bond report information, and obtaining property by false pretenses. On 6 July 2015, Defendant waived his right to counsel, opting to proceed *pro se*.

On 2 July 2017, the court called Defendant’s case for trial. Through a series of four witnesses, the State began its case introducing court records of Defendant’s bonds, the Department of Insurance’s procedures and requirements for licensing of bail bondsmen, and Defendant’s bank accounts, which showed delinquencies.

The State first called Catherine Morrison, Clerk of the Union County Superior Court. Morrison maintains the bail bond records of the criminal division of court. Through her testimony, Morrison identified and the State introduced into evidence twenty-four bond forfeiture notices signed by Defendant. Of the twenty-four bonds the State introduced, eighteen bonds are listed in the indictments for unlawfully accessing a government computer and falsification of monthly bail bond report information. Six other bonds are only listed in the indictment for the falsification of monthly bail bond report information. For twelve of the bonds listed in both indictments, Defendant received \$3,225 in premium fees. Defendant received the following amounts: (1) \$500 for Jonathan Sheppard’s bond; (2) \$100 for Joshua Newton’s bond; (3) \$400 for James Massey’s bond; (4) \$375 for Ronnie Marble’s bond;

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(5) \$100 for one of Justin Maldonado's bonds;¹ (6) \$100 for another one of Justin Maldonado's bonds; (7) \$300 for Dennis Knox's bond; (8) \$75 for Xandria Harris's bond; (9) \$200 for Elizabeth Greene's bond; (10) \$75 for Cortez Grace's bond; (11) \$800 for Tammy Evans's bond; and (12) \$200 for Tyrone Alsbrooks's bond. This testimony established the funds Defendant received during this period of time, which includes bonds he should have listed in his daily logs and monthly reports, as explained hereafter.

The State then called Frank Bradley, an employee of U.S. Bank National Association ("U.S. Bank"). U.S. Bank maintains Defendant's security account required by the North Carolina's bail bondsman program, see discussion *infra*. Bank records introduced through Bradley show Defendant's bank accounts had the following funds deposited: (1) on 31 December 2008, \$22,173.67; (2) on 31 December 2009, \$22,040; (3) from 1 January 2010 to 31 December 2010, \$21,960; (4) on 31 December 2011, \$21,800; (5) on 31 December 2012, \$21,800; (6) on 31 December 2013, \$21,800; and (7) in June 2014, \$21,800. On 2 December 2014, Defendant deposited \$178,300. On 31 December 2014, Defendant's account held a cash on hand balance of \$200,100. These funds establish the dollar amount of individual bonds Defendant could issue under Department of Insurance regulations, as explained *infra*.

The State next called Keisha Burch, a complaint analyst in the Bail Bond Regulatory Division of the Department of Insurance, for the purpose of explaining the process of becoming a licensed bail bondsman.² Burch explained an applicant must take a pre-licensing bond course and pass the course's examination. If successful, an applicant then applies for a State license and is investigated to establish his qualifications. Once qualified, the Department of Insurance sends him a letter, authorizing him to take a State administered examination. In the event the applicant passes, the applicant is required to deposit a minimum amount of

1. Justin Maldonado's and Cortez Grace's bonds were only included in the falsification of monthly bail bond report information indictment. All other bonds were in both the unlawfully accessing a government computer indictment and falsification of monthly bail bond report information indictment.

2. The North Carolina Department of Insurance governs bail bondsmen in North Carolina. The Department of Insurance is split into three divisions: (1) the Bail Bond Regulatory Division, which analyzes complaints and conducts investigations of alleged bail bond violations; (2) the Criminal Investigations Division, which investigates alleged criminal violations arising under Chapter 58 of the General Statutes; and (3) the Agent Services Division, which handles regulation licensing, collection of license fees, and renewal of licenses.

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\$15,000 in a security account (similar to the one Defendant established at U.S. Bank). The security account allows the Department of Insurance to match the funds deposited to the amount of bonds written.

Next, Burch explained the process of license renewal. Bondsmen hold licenses for one year. Before the annual expiration date, the Department of Insurance sends bail bondsmen a notice of renewal. To be renewed, a bondsman must complete the paperwork before the deadline, pay renewal fees, and complete required continuing education. If renewed, the bondsman does not obtain a new license, but retains his existing license for another year. As long as a bondsman properly renews his license, he continuously holds his license through successive renewal periods.

In the event a lapse occurs in the license for non-renewal, the bondsman is required to reapply. Upon reapplication, the bondsman would receive a new license, but not a new license number.

All bondsmen have to retain a security deposit fund in a special security account, which “is an account that [the Department of Insurance has] for the professional bail bondsman to deposit money.” The amount on deposit regulates both the dollar amount of any individual bond a bondsman can issue and the total aggregate dollar amount of bonds a bondsman can issue in two ways.

The Department of Insurance’s rules are known as the “one quarter rule” and the “eight times rule[.]” Under the one quarter rule, the bondsman cannot write bonds for more than one quarter of the deposit amount for any single individual. Under the eight times rule, the bondsman can, in the aggregate, only write bonds equal to a sum of eight times the amount deposited in the account. Several witnesses illustrated the rules as follows. First, under the one quarter rule: (1) if a bondsman had a \$20,000 deposit, the largest amount of a bond he could write for one individual would be a \$5,000 bond; or (2) with a \$15,000 deposit, he could write a \$3,750 bond for one individual. Under the eight times rule, with a \$20,000 deposit, the bondsman could write up to \$160,000 in bonds.

To document bonds written against the security deposit on hand, bondsmen are legally required to keep monthly reports of the bonds they issue. Monthly reports are “reports that are sent in by the professional bondsman only of all of the bonds that they have written that are currently outstanding[.]” as of the fifteenth of the month. Bondsmen are required to file the monthly reports with the Department of Insurance.

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Burch identified and the State introduced the Department of Insurance's "demographic record" for Defendant.³ The demographic record showed the following. Defendant first became licensed on 26 February 1998. At the time of trial, Defendant held an active professional bail bond license, surety bail bond license, and bail runner license.

The State introduced Defendant's monthly reports from December 2008 to July 2014. On the bottom of each monthly report, Defendant signed an attestation clause, certifying he was "submitting a true and accurate report."

On 11 April 2013, Burch sent Defendant a notice of deficiency. The letter stated the Department of Insurance reviewed Defendant's March 2013 report and determined the amount in his security deposit was deficient. On 24 November 2014, the Department of Insurance sent Defendant another notice of deficiency. In response to the notice, Defendant cured the deficiency by depositing \$178,200 in his security account.

The State next called Steve Bryant, a senior complaint analyst in the Bail Bond Regulatory Division of the Department of Insurance. Bryant sent Defendant the 24 November 2014 notice of deficiency. The notice indicated the Department of Insurance received information Defendant omitted bonds in his monthly reports.⁴ The notice also asserted Defendant exceeded both the one quarter and eight times rules for two individuals' bonds, Randall Shehane and Martin Cavanaugh.⁵ Defendant wrote Shehane a \$50,000 bond and Cavanaugh a \$10,000 bond. At the time he wrote those two bonds, Defendant maintained a \$21,800 deposit in his security account. This created a deficiency under the one quarter rule, because with \$21,800 on deposit, Defendant could only write bonds up to \$5,450 per individual (Burch's testimony indicated Defendant cured this deficiency).⁶

After Bryant's direct examination, Defendant cross examined Bryant in support of his theory of selective prosecution. Bryant testified he

3. Although the State introduced into evidence Defendant's demographic record, it is not included in the record on appeal.

4. Bryant's testimony did not state who gave the Department of Insurance this information.

5. These individuals' names are spelled differently in the bonds and in the trial transcript.

6. Bryant did not explain how Defendant violated the eight times rule.

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spoke with Timothy Pardeau, a criminal investigator. Bryant “referred” certain documents to the Criminal Investigations Division.

Defendant asked the following:

Q. And how many professional bondsmen have you investigated for this type of alleged activity?

A. I don’t have an exact count.

Q. Could you give us a general idea, 10, 50, 100?

A. It’s approximately 20, if I were to take a guess.

Q. And out of those 20, – out of those 20, how many of those have you ever criminally charged with violations?

A. I don’t have authority to criminally charge anybody.

Q. How many of those 20 have you ever known to be criminally charged for those violations?

A. Again, that would be a question for the Criminal Investigations Division. I don’t have – I’m not a sworn officer, I cannot – I don’t have privy to that information.

Q. Do you know of any criminal investigations that have been from the 20 people that you investigated alleged complaint?

A. I know you as one of them and I believe your brother Robert Mathis was also charged.

Q. Would one of the other ones be a Roland Loftin?

A. Again, I don’t know if he was charged. That again would be a question for Criminal Investigations Division.

Q. Other than me and my brother, do you know of or have you heard of any other professional bondsman that has ever been charged with a criminal charge concerning monthly reports and reporting issues by one of these 20 people?

A. I don’t recall anybody informing me of that.

Q. So your answer is that nobody has been charged that you know of other than me and my brother?

A. I’m not aware of it.

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The State called Timothy Pardeau, an investigator in the Criminal Investigations Division of the Department of Insurance. In 2014,⁷ Pardeau's supervisor assigned him Defendant's case, which was based on "an allegation that there was some bonds that were written by [Defendant] that were not reported on the monthly reports." In the beginning of his investigation, Pardeau contacted the Agent Services Division for access to Defendant's monthly reports. Pardeau collected bonds Defendant wrote from the Clerk of Court's office. Pardeau reviewed the bonds and monthly reports to determine if any bonds were missing from the reports.

Pardeau "discovered that there was numerous bonds that had been written by [Defendant] under his professional license utilizing the seals that had not been reported on his monthly reports to Agent Services Division." The State introduced, without objection, an excel spreadsheet Pardeau created as part of his investigation. The spreadsheet showed twenty-four bonds missing from Defendant's monthly reports, from 2008 to 2014. These were the twenty-four bonds admitted during Morrison's testimony and included in the unlawfully accessing a government computer and falsification of monthly bail bond report information indictments. Defendant omitted two bonds from only one monthly report. However, Defendant failed to include another bond, for \$40,000, in thirty-one monthly reports: (1) December 2008; (2) January, February, March, April, May, October, November, and December 2009; (3) January, February, March, May, June, July, September, November, and December 2010; (4) March, April, May, June, July, August, September, October, November, and December 2011; and (5) January, February, and April 2012. The highest balance Defendant had during those five years was \$22,173.67. Under the one quarter rule, Defendant could only write a \$5,543.42 bond.

Our examination of the spreadsheet and testimony shows the following. As an example of how Defendant profited from withholding information, in 2011, Defendant kept a \$21,800 balance in his security account. Under the one quarter rule, Defendant could write only a \$5,450 bond. Pardeau found four bonds—in the amounts of \$10,000, \$10,000, \$40,000, and \$50,000—not included in the monthly reports during 2011. For one of the \$10,000 bonds, Defendant received \$800 in bond premium. Defendant did not earn any bond premium on the other \$10,000 bond or the \$40,000 and \$50,000 bonds. However, to issue a

7. Pardeau testified he first started investigating "in the latter half of 2014."

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\$50,000 bond, Defendant would need \$200,000 deposited in his security account, \$178,200 more than his deposit amount in 2011. Also, in 2011 and 2012, Defendant omitted a \$10,000 bond for defendant Alsbrooks. Due to his account balance in 2011 and 2012, Defendant could only issue bonds in the amount of \$5,450 and still comply with the one quarter rule. Defendant earned \$200 in bond premium for the Alsbrooks's bond.

When asked how Defendant obtained property by false pretenses, Pardeau explained:

The basis of my obtaining property by false pretense was the fact that you submitted an application for a bail bonding license. Had they known that fraud was being committed or monthly reports were being falsely submitted, my assumption would be that they would not have given you a license because that's a felony in the State of North Carolina, convicted felons are not allowed to hold bail bonding licenses.

Defendant asked Pardeau if he could testify he knew Defendant "physically, personally generated and submitted to the SBS system[.]" Pardeau answered:

I can only testify as to what I just said, sir, that your user name and password was utilized to access the State system and that your e-mail was utilized to submit these reports and that your signature was on the bottom of some of these reports, or many of these reports, not all.

Additionally, some reports were sent from Defendant's email.⁸

The State rested.⁹ Defendant moved to dismiss all the charges. The trial court denied Defendant's motion.

Defendant called Wayne Goodwin, the former Commissioner of the Department of Insurance. When Defendant began to question Goodwin about his relationships with members of the North Carolina Bail Agent's Association, the State objected on relevance grounds. Defendant argued Goodwin's testimony would show he "was in office when these charges were brought [and] will show that he was working as the Department to get rid of me and the company that I work with[.]" Defendant also

8. Defendant contends the State did not present evidence he sent these emails.

9. The State also called: (1) Kayla Vann, the records custodian for the North Carolina Department of Revenue; and (2) Bryan Huncke, a sergeant with the Union County Sheriff's Office.

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asserted Goodwin's testimony would show he selectively enforced the laws against Defendant.

The court allowed Defendant to make a proffer. After Defendant asked Goodwin six additional questions, the court stated it was "having . . . difficulty finding how this is at all relevant to anything." The court asked Defendant to "please get to something that . . . is relevant to the issues that are being tried[.]" and said, "if [Defendant] wish[ed] to ask him some questions that would make this relevant, [it]'d be happy to consider it[.]" Defendant responded, "without going through a bit more I would just say I'm good with that and I'll be done with this witness." The court asked Defendant if he wished to be heard on the issue of relevancy. Defendant requested he be allowed to ask one more question. The court agreed to one more question. The court allowed Defendant to ask six more questions, and Defendant ended his proffer.

Defendant called Rebecca Shigley, a former deputy commissioner of the Agent Services Division of the Department of Insurance. Shigley investigated a complaint about Defendant, which Phillip Bradshaw, a licensed bail bondsman on the board of the North Carolina Bail Agent's Association, sent. After receiving the complaint, Shigley referred the matter over to the Criminal Investigations Division. During Shigley's investigation, she met with Defendant, along with an attorney from the Department of Justice. At the meeting, Defendant asserted the issues in his monthly reports arose from the person submitting the reports omitting the last three lines of the report.

The following questioning occurred:

Q. Ms. Shigley, to your knowledge how many professional bail bondsman have ever been charged for clerical errors on monthly reports?

A. I do not know.

Q. During your tenure do you have any idea?

A. I do not know.

Q. Are you appri[s]ed of the people that are charged once y'all -- if the investigation is done?

...

A. I'm sorry. Agent Services Division does not handle any criminal matters. If when we are reviewing a complaint we find that there are -- possibly are criminal violations,

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we refer it over to the Criminal Investigations Division and they generally do not appri[s]e us of the case after that.

Q. And so when you get a complaint that could possibly be a felony charge or a criminal violation, the ASD doesn't investigate that, they send that to the CID; correct?

A. That's correct, that's our procedure.

Q. And under your senior tenure as the deputy, was it your policy that any investigation that was done on a criminal activity be done through the Criminal Investigative Division for a criminal offense?

A. It was our policy that as we were reviewing a complaint if there was an administrative complaint the Agent Services Division would handle it and if part of the complaint or the whole complaint was a criminal – possible criminal matter, we referred it to the Criminal Investigations Division to handle as they deem appropriate.

When asked how many bondsman she knew the State criminally charged for violation of the reporting laws, Shigley answered, "We handle administrative things so I'm not always aware of the criminal charges, but I do know that there were two bail bondsman that were charged criminally based on bail bondsman monthly reports." Those two people were Defendant and his brother. However, Shigley did "know of several professional bail bondsman that had additionally regulatory action taken against their bail bondsman license and there several complaints" during her time in the Agent Services Division.

Defendant rested and renewed his motion to dismiss. The trial court denied Defendant's motion.

During deliberations, the jury asked the court to define property. The State asserted "it's pretty clear the property that is referred to in the indictment is the bail bondsman's license." The jury returned to the courtroom, and the court instructed, "property is not defined in the statute and . . . we ask that you use your good judgment and common sense at arriving at your understanding of what the term property means." The jury found Defendant guilty of obtaining property by false pretenses, falsification of monthly bail bond report information, and unlawfully accessing a government computer. The court consolidated the offenses and sentenced Defendant to 13 to 25 months imprisonment. Defendant gave oral notice of appeal.

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II. Standard of Review

We review the sufficiency of an indictment for subject matter jurisdiction, Defendant's double jeopardy argument, and his claim of selective prosecution *de novo*. *State v. Collins*, 221 N.C. App. 604, 610, 727 S.E.2d 922, 926 (2012) (citation omitted) (reviewing an indictment *de novo*); *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted) (reviewing constitutional claims *de novo*).

We also review motions to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). “ ‘Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.’ ” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted).

Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant’s guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant’s guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (internal citations, quotation marks, and italics omitted) (alteration in original).

III. Analysis

Defendant brings forth the following arguments: (1) the indictment charging him for unlawfully accessing a government computer was fatally defective; (2) the trial court erred in denying his motion to dismiss the accessing a government computer charge; (3) the State violated his constitutional right against double jeopardy; (4) the trial court erred in denying his motion to dismiss the falsifying monthly bail bond report information charge; (5) the trial court erred in denying his motion to dismiss the obtaining property by false pretenses charge; and (6) the

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State violated his constitutional right of equal protection by selectively prosecuting him. We address these arguments in turn.

A. Validity of the Indictment

[1] Defendant first argues the indictment failed to sufficiently allege the essential elements of the crime. Specifically, Defendant alleges his acts were not willful or with criminal intent because the Department of Insurance required him to submit monthly reports.

The State charged Defendant for violation of N.C. Gen. Stat. § 14-454.1, which states:

(a) It is unlawful to willfully, directly or indirectly, access or cause to be accessed any government computer for the purpose of:

(1) Devising or executing any scheme or artifice to defraud, or

(2) Obtaining property or services by means of false or fraudulent pretenses, representations, or promises.

A violation of this subsection is a Class F felony.

(b) Any person who willfully and without authorization, directly or indirectly, accesses or causes to be accessed any government computer for any purpose other than those set forth in subsection (a) of this section is guilty of a Class H felony.

N.C. Gen. Stat. § 14-454.1 (a)-(b) (2017).

A valid indictment must contain:

(1) the identification of the defendant; (2) a “separate count addressed to each offense charged”; (3) the county in which the offense took place; (4) the date, or range of dates, during which the offense was committed; (5) a “plain and concise factual statement in each count” that supports every element of the offense and the defendant’s commission thereof; and (6) the “applicable statute, rule, regulation, ordinance, or other provision of law alleged therein to have been violated.

State v. Golder, ___ N.C. App. ___, ___, 809 S.E.2d 502, 505-06 (2018) (citing N.C. Gen. Stat. § 15A-924(a)(1)-(6) (2017)). “As a general rule, an indictment couched in the language of the statute is sufficient to charge

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the statutory offense.” *Id.* at ___, 809 S.E.2d at 506 (quotation marks and citation omitted).

The substantive portion of the indictment at issue reads:

The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did access by means of inputting information as part of required monthly reports on outstanding bond obligations under N.C.G.S. 58-71-165 the government computer system operated and maintained by the North Carolina Department of Insurance (a State Government entity) in order to commit fraud. Specifically the defendant entered and submitted information falsely by withholding specific bond liabilities outstanding in the following defendants’ criminal matters: [(listed fourteen defendants)]. These bonds were withheld while submitting as an accurate accounting other bond obligations, and thus falsely represented his total amount of outstanding liability. This was done for the purpose of obtaining property - a professional bail bondsman’s license - as well as money and fees (premiums) charged in connection with the bonding of individuals, which was done under the Defendant’s professional bonding license, as well as to maintain a lower balance in the monthly required securities account maintained according to the North Carolina General Statutes.

Defendant contends the State failed to prove willfulness because the State compels Defendant to keep monthly bail bond reports. Defendant contends if the State compelled him to complete and submit monthly reports, then his inadvertent failure to accurately report his transactions cannot be considered intentional. This argument has no bearing on the validity of the indictment and is addressed *infra*.¹⁰

B. Motion to Dismiss Accessing A Government Computer Charge

[2] Next, Defendant argues the court erred in denying his motion to dismiss his charges under N.C. Gen. Stat. § 14-454.1. Defendant brings

10. In the issue heading, Defendant asserts the State charged him with a vague and overly broad indictment. Defendant brought forth no substantive argument in support of these contentions.

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forth the following issues: (1) whether his actions meet the definition of willful¹¹ or “without authorization”; and (2) whether his actions constituted accessing or causing to be accessed a government computer.

1. Willful or Without Authorization

First, we address willfulness and without authorization. Our review of the plain language of the statute shows the subsection under which the State charged Defendant, included *supra*, does not include the words “without authorization.”

For computer-related crimes, our General Assembly defines “Authorization” as: “having the consent or permission of the owner, or of the person licensed or authorized by the owner to grant consent or permission to access . . . not exceeding the consent or permission.” N.C. Gen. Stat. § 14-453 (1a) (2017). When our Supreme Court reviewed willfulness for another computer-related crime, it applied the traditional definition of willful and not the definition of “authorization” in N.C. Gen. Stat. § 14-453(1a). *State v. Ramos*, 363 N.C. 352, 355, 678 S.E.2d 224, 226 (2009) (citation omitted). Additionally, this Court has both included the definition of “authorization” in its analysis of willful and has omitted the definition and only required the State to produce substantial evidence of the traditional definition of willful. *Compare State v. Johnston*, 173 N.C. App. 334, 618 S.E.2d 807 (2005) (using the “authorization” definition), *with State v. Ramos*, 193 N.C. App. 629, 668 S.E.2d 357 (2008), *aff’d*, 363 N.C. 352, 678 S.E.2d 224 (2009) (distinguishing the traditional definition of willful and the definition of authorization). We note the terms “without authorization” and “willfulness” do not fully encompass each other. Indeed, when a defendant challenged jury instructions which only included the definition of “without authorization” but not the definition of “willfulness”, this Court stated “[o]ne may act ‘without authorization,’ but still not act willfully.” *Ramos*, 193 N.C. App. at 636, 668 S.E.2d at 363.

Unlike N.C. Gen. Stat. § 14-454.1 (b) and (c), which both include the words “willfully” and “without authorization”, subsection (a) only requires “willful[]” action. N.C. Gen. Stat. § 14-454.1 (a)-(c).¹² However,

11. In support of his argument, Defendant cites to “the reasons stated above in Issue I[.]”

12. Subsection (c) states, “Any person who willfully and without authorization, directly or indirectly, accesses or causes to be accessed any educational testing material or academic or vocational testing scores or grades that are in a government computer is guilty of a Class 1 misdemeanor.” N.C. Gen. Stat. § 14-454.1 (c).

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our Court read the “without authorization” requirement into the definition of “willful” for this very subsection in *State v. Barr*, 218 N.C. App. 329, 721 S.E.2d 395 (2012).

In *Barr*, the defendant brought forth the same argument asserted in the case *sub judice*—whether her actions were willful. Barr owned and operated Lexington License Plate Agency and worked as a title clerk. *Id.* at 331, 721 S.E.2d at 397-98. After the sale of a vehicle, a car dealer transfers title by delivering the paperwork to a license plate agency. *Id.* at 331, 721 S.E.2d at 398. At the agency, a title clerk checks the paperwork and “accesses a computer system called State Title and Registration System (‘STARS’)” to enter in the title clerk’s “unique” number and a password. *Id.* at 331, 721 S.E.2d at 398. After a title clerk enters the information for a transfer, the title clerk can process the transfer of title. *Id.* at 331, 721 S.E.2d at 398.

Barr transferred titles for Lanier Motor Company; however, in 2008, Lanier lost its license and continued to sell vehicles without a license. *Id.* at 332, 721 S.E.2d at 398. When another title clerk tried to enter Lanier’s dealer identification number into STARS, the computer noted the number was invalid. *Id.* at 332, 721 S.E.2d at 398. The clerk entered “OS” into the system, indicating the dealer was an out-of-state dealer. *Id.* at 332, 721 S.E.2d at 398. There was conflicting evidence if Barr herself instructed others to enter OS, or if someone from the DMV instructed Barr to input OS. *Id.* at 332, 721 S.E.2d at 398. One witness testified when he told Barr that Lanier’s dealer number was inactive, Barr replied “to go ahead and process it an as O S[.]” *Id.* at 339, 721 S.E.2d at 402.

A jury convicted Barr of three counts of unlawfully accessing a government computer for a fraudulent purpose and two counts of aiding and abetting the unlawful access of a government computer. *Id.* at 333, 721 S.E.2d at 399. On appeal, Barr argued the State did not introduce substantial evidence of willfulness because evidence showed she believed a DMV worker instructed her to input certain information into the government computer. Our Court concluded, taken in the light most favorable to the State, the State presented substantial evidence of Barr’s willfulness to violate N.C. Gen. Stat. § 14-454.1(a)(2), because the testimony showed Barr acted “purposely and deliberately, indicating a purpose to do it without authority—careless whether [s]he has the right or not—in violation of the law[.]” *Id.* at 340, 721 S.E.2d at 403 (citation and quotation marks omitted) (second alteration in original).

To our Court, it is telling in *Barr*, defendant had authorization to utilize and access STARS. However, she did *not* have authorization

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to input the fraudulent information she inputted—to transfer title for an unlicensed in-state dealer and label the transfer as one for an out-of-state dealer. Similarly, here, Defendant had the authorization to use the SBS system. However, Defendant exceeded that authorization by inputting fraudulent information. The State submitted substantial evidence of Defendant inputting fraudulent information into the SBS system and the willfulness of his actions. Defendant’s argument lacks merit.

2. Accessing a Government Computer

Second, “Access” is defined as “to instruct, communicate with, cause input, cause output, cause data processing, or otherwise make use of any resources of a computer, computer system, or computer network.” N.C. Gen. Stat. § 14-453 (1). The unlawfully accessing a government computer statute includes both direct and indirect access of a government computer. N.C. Gen. Stat. § 14-454.1 (a).

Defendant asserts “sending information by SBS or e-mail does not” meet the definition of access, as he merely transmitted information, which the Department of Insurance’s personnel actually uploaded into the system. While Defendant contends he did not personally access a government computer, he also states he “submitted information as required by the Department of Insurance using the computer system”

We conclude the State presented substantial evidence Defendant accessed, or caused another to access, a government computer. The SBS database qualifies as such a government program, and, thus, any access is access of a “government computer.” Pardeau testified although he could not know Defendant “physically, personally” submitted information to the SBS system, there is substantial circumstantial evidence to withstand Defendant’s motion to dismiss. To upload the monthly reports, a unique user name and password must be used, and Defendant’s unique user name and password were used to access SBS. Additionally, Defendant’s email “was utilized” to submit the reports, which Defendant signed. Even if we were to accept Defendant’s argument he only transmitted information then uploaded by the Department of Insurance’s personnel, the statute not only covers accessing, but also if Defendant caused the government computer “to be accessed[.]” N.C. Gen. Stat. § 14-454.1 (a). Thus, his argument is unavailing.¹³

13. Defendant also alludes to the possibility of an employee of his uploading the information. However, as stated *supra*, the statute encompasses when a person causes, directly or indirectly, a computer to be accessed. N.C. Gen. Stat. § 14-454.1 (a). Additionally, the

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Finally, at oral argument, Defendant contended the intent of the statute could not be the mere submission of information. He argued the General Assembly wanted actual interaction with a government computer. However, the plain language, with the inclusive language of “access or cause to be accessed” and “directly or indirectly” dispel Defendant’s contention. Accordingly, we hold the trial court did not err in denying Defendant’s motion to dismiss the accessing a government computer charge.¹⁴

C. Double Jeopardy

[3] On appeal, Defendant argues the State violated his right against double jeopardy by charging him for both obtaining property by false pretenses and accessing a government computer.

“Constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal.” *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004). Rule 10 (a)(1) requires Defendant to make “a timely request, objection, or motion, stating *the specific grounds* for the ruling the party desired the court to make[.]” N.C. R. App. P. 10 (a)(1) (2017) (emphasis added).

Our review of the record shows Defendant failed to bring forth this argument at the trial level. While Defendant argued some of the crimes charged violated his right against double jeopardy, he based his arguments on the civil action revoking his licenses, which arose from the same actions giving rise to the criminal charges. Defendant brought forth no argument about a lesser included offense to the trial court. Consequently, the trial court could not make a determination on whether the crime of obtaining property by false pretenses is a lesser included offense of accessing a government computer for unlawful purposes. Accordingly, Defendant failed to preserve this argument for appellate review, and we dismiss this argument.

D. Falsifying Monthly Bail Bond Report Information Charge

[4] Defendant next contends the State failed to present sufficient evidence he violated N.C. Gen. Stat. § 58-71-165 (2017) and, thus, the court

State presented sufficient evidence of access, either directly or indirectly, by Defendant to withstand his motion to dismiss.

14. At trial and at oral argument, though not directly in his brief, Defendant argued the SBS system is not a government computer. N.C. Gen. Stat. § 14-453 (7a) defines a “Government computer” as “any computer, computer program, computer system, computer network, or any part thereof, that is owned, operated, or used by any State or local governmental entity.” N.C. Gen. Stat. § 14-453 (7a) (2017).

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erred in denying his motion to dismiss. He contends the missing information in the reports, as alleged, “strongly suggests these omissions were clerical errors committed by [his] staff.”

We conclude the State presented substantial evidence to withstand Defendant’s motion to dismiss this charge. The State presented evidence of the false reports, Defendant signing the attestation clause certifying he submitted true information, and the reports being filed via the SBS system. The question of fact—whether the omissions were fraud or clerical errors—was one to be determined by the jury. Accordingly, we hold the trial court did not err in denying Defendant’s motion to dismiss this charge.

E. Obtaining Property by False Pretenses Charge

[5] On appeal, Defendant argues the State failed to submit sufficient evidence of “causation” between the false representation and the obtaining of something of value. Defendant’s argument is two-fold. First, he contends the only evidence of causation is the testimony from the State’s witness, Timothy Pardeau. He argues this evidence, alone, is insufficient to show he “had a motive, plan or scheme which was intended to enable him to obtain a bail bond license which he already held.” Second, Defendant argues he did not *obtain* anything of value, as he already had a bondsman license.

N.C. Gen. Stat. § 14-100 states:

If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony

N.C. Gen. Stat. § 14-100 (a) (2017).

Black’s Law Dictionary defines “obtain” as, *inter alia*, “To bring into one’s own possession; to procure” *Black’s Law Dictionary* 1247 (10th ed. 2014). Black’s defines “retain” as, *inter alia*, “To hold in possession or under control; to keep and not lose, part with, or dismiss.” *Id.* at 1509. Additionally, Webster’s defines “obtain” as, *inter alia*, “to get possession of, esp. by some effort; procure[.]” *Merriam Webster’s New*

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World College Dictionary 1010 (5th ed. 2014). Webster's defines "retain" as, *inter alia*, "to hold or keep in possession" and "to continue to have or hold[.]"¹⁵ *Id.* at 1240.

The indictment for obtaining property by false pretenses states:

The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud obtain and attempt to obtain a Professional Bail Bondsman's License issued by the North Carolina Department of Insurance"

Both Defendant and the State agree at the time of the alleged acts, Defendant already had his bail bondsman license. The State likens obtaining to retaining. At oral argument, the State asserted "retaining wrongfully is obtaining." The State also contended obtaining a renewal may be obtaining. We disagree.

We conclude the State failed to produce sufficient evidence Defendant *obtained* a professional bail bondsman's license. Defendant received—*obtained*—his license on 26 February 1998. The indictment for this charge lists the dates of offense as 1 July 2009 to 1 July 2014. The State presented no evidence of Defendant's actions prior to 26 February 1998 at trial, and even if it had, there would be a fatal variance between the indictment and the evidence at trial.

While the State likens "retaining" to "obtaining," we conclude retain is not within the definition of obtain. We note, the Department of Insurance has different processes and requirements for *obtaining* a bail bondsman license and *renewing* (retaining) a license. Additionally, the State's assertion at oral argument—Defendant obtained a renewal—is not what the State alleged in the indictment. Instead, the indictment states Defendant obtained "a Professional Bail Bondsman's License", not a "*renewal* of a Professional Bail Bondsman's License."¹⁶ Thus the trial court erred by denying Defendant's motion to dismiss the obtaining

15. Additionally, in the Legal Thesaurus, "obtain" and "retain" are not listed as synonyms of each other. *Legal Thesaurus* 357, 454 (2d ed. 1992).

16. At oral argument, the State also contended "attempting to obtain" a license is equivalent to obtaining. While attempting to obtain property is within the crime of obtaining property by false pretenses, the inclusion of "attempt" does not bring "retaining" within the definition of "obtaining."

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property by false pretenses charge.¹⁷ *State v. Hinton*, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007) (citation omitted) (“In construing ambiguous criminal statutes, we apply the rule of lenity, which requires us to strictly construe the statute.”).

F. Selective Prosecution

[6] Finally, Defendant brings forth a selective prosecution argument. He contends: (1) the trial court erred in sustaining the State’s objection during his questioning of Wayne Goodwin; and (2) regardless of the court’s error, he presented a *prima facie* showing of selective prosecution.

To demonstrate selective prosecution Defendant must:

first, . . . make a *prima facie* showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not; second, after doing so, he must demonstrate that the discriminatory selection for prosecution was invidious and done in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

State v. Pope, 213 N.C. App. 413, 416, 713 S.E.2d 537, 540 (2011) (citation and quotation marks omitted).

As included above, during Goodwin’s testimony, Defendant began to question Goodwin on the background of the charges at issue, and the State objected. The court allowed Defendant to make a proffer before ruling on the objection. After six questions, the court interrupted, stating it had “difficulty” seeing how the testimony was relevant to the issues at trial. The court stated “if you wish to ask him some questions that would make this relevant, I’d be happy to consider it but I frankly don’t hear that yet.” Defendant replied, “Your Honor, without going through a bit more I would just say I’m good with that and I’ll be done with this witness.” Defendant asked the court if he could ask one more question, which

17. Lastly, at oral argument, Defendant contended were this obtaining property by false pretenses charge to “fall”, the trial court should have also dismissed the other charges. However, the indictment for the unlawfully accessing a government computer charge states Defendant obtained not only a license, but also “money and fees (premiums) charged in connection with the bonding of individuals[.]” Additionally, the falsifying monthly bail bond report information charge requires no such obtaining. Thus, these charges do not “fall” with the obtaining property by false pretenses charge.

We need not address Defendant’s argument about the sufficiency of Pardeau’s testimony, as we reverse this charge on other grounds.

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the court allowed. Defendant actually asked an additional six questions. Then Defendant stated he was “just going to stop right there[.]” The court sustained the State’s objection. Defendant stated he had no more questions for Goodwin before the jury returned. After the jury returned, Defendant did not ask Goodwin any more questions.

First, we conclude the trial court did not erroneously limit Defendant’s offer of proof. As stated *supra*, the court directed Defendant to ask questions which would bring forth relevant testimony. Additionally, the court allowed Defendant to ask several more questions of the witness, and Defendant terminated the questioning.

[7] Second, Defendant failed to make a *prima facie* showing of selective prosecution. Defendant points to two of the State’s witnesses’ testimonies. First, Steve Bryant testified he investigated “approximately 20” other individuals for the “type of alleged activity” at issue. When Defendant asked Bryant how many of the twenty Bryant criminally charged, Bryant answered he did not have the authority to criminally charge anyone. Defendant asked if Bryant knew of criminal investigations resulting from his investigations, and Bryant answered he knew Defendant “as one of them[.]” Additionally, Bryant had not heard or was not aware of others being charged as a result of his investigations. Another witness, Rebecca Shigley, testified she did not know if other bail bondsmen had been charged “for clerical errors on monthly reports” and her division did “not handle any criminal matters.” While Defendant characterizes this testimony as proof of “the total lack of prosecutions of bail bondsmen by the Department for intentionally filing false reports[.]” the testimony does not indicate as such. Accordingly, we conclude the trial court did not err.

IV. Conclusion

For the foregoing reasons, we reverse the trial court’s denial of Defendant’s motion to dismiss the obtaining property by false pretenses charge. We remand the matter for resentencing. We dismiss Defendant’s double jeopardy argument and find no error in the rest of the judgments.

NO ERROR IN PART; DISMISSED IN PART; REVERSED IN PART;
REMANDED FOR RESENTENCING.

Judges ELMORE and ZACHARY concur.

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[261 N.C. App. 285 (2018)]

JANICE THOMPSON, PLAINTIFF

v.

CHRISTOPHER LEE BASS AND DONALD WAYNE BOYD, DEFENDANTS

No. COA17-1194

Filed 4 September 2018

1. Contracts—breach—purchase of business—internet sweepstakes—summary judgment for defendants

The trial court did not err by granting summary judgment for defendants in an action arising from the purchase of an internet sweepstakes business. Plaintiff owned internet sweepstakes in two counties and sought to buy defendant's business in a third. Law enforcement officers shut down the business in the third county after the purchase. Plaintiff acknowledged receiving all of the items she had expected to receive with the purchase and operated the business from its purchase until it was shut down. Plaintiff did not allege the specific provisions breached, nor a single fact constituting a breach with either defendant.

2. Fraud—elements of claim—purchase of business—internet sweepstakes

The trial court did not err by finding that plaintiff buyer's reliance on any misrepresentation or concealment of fact by defendant seller was unreasonable as a matter of law. Plaintiff was well aware of the risks of the internet sweepstakes business and failed to exercise due diligence when she did not inquire of law enforcement about the legality of the business she was purchasing.

3. Appeal and Error—no meaningful argument—unfair trade practices—purchase of business—internet sweepstakes

Plaintiff's claim for unfair and deceptive trade practices in an action arising from her purchase of an internet sweepstakes business was deemed abandoned when she failed to submit any meaningful argument as to how the trial court erred by granting summary judgment for defendants.

4. Appeal and Error—no meaningful argument—civil conspiracy—purchase of business—internet sweepstakes

Plaintiff's claim for civil conspiracy in an action arising from her purchase of an internet sweepstakes business was deemed abandoned when she failed to submit any meaningful argument as to how the trial court erred by granting summary judgment for defendants.

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Appeal by plaintiff from order entered 7 June 2017 by Judge G. Wayne Abernathy in Nash County Superior Court. Heard in the Court of Appeals 2 May 2018.

Gay, Jackson & McNally, L.L.P., by Darren G. Jackson, Andy W. Gay, and Daniel Patrick McNally, for plaintiff-appellant.

Etheridge, Hamlett, & Murray, L.L.P., by J. Richard Hamlett, II, and William D. Etheridge, for defendant-appellee Bass.

The Valentine Law Firm, by Kevin N. Lewis, for defendant-appellee Boyd.

ELMORE, Judge.

Plaintiff Janice Thompson appeals from an order granting defendants Christopher Lee Bass and Donald Wayne Boyd's motions for summary judgment on plaintiff's claims for breach of contract, fraud, rescission, unfair and deceptive trade practices, punitive damages, and civil conspiracy arising out of the 2015 sale of an internet sweepstakes business in Nash County.

Because plaintiff has failed to forecast sufficient evidence of a genuine issue of material fact as to any of her claims and thereby withstand defendants' motions for summary judgment, we affirm.

I. Background

As of July 2015, plaintiff had owned and operated three internet sweepstakes businesses one located in Lenoir County and two located in Pitt County for approximately three years. Defendant Bass had owned and operated an internet sweepstakes business located in Nash County for approximately six years, while defendant Boyd was a third-party vendor who supplied defendant Bass with software owned by Aurora Technology, Inc.

On 20 November 2014, plaintiff received a written notification from Lenoir County law enforcement informing her that the games being played on the machines in her business violated N.C. Gen. Stat. § 14-306.4 ("the sweepstakes statute"). The purpose of the notification was to encourage voluntary compliance with the sweepstakes statute and allow those involved in the operation of such businesses "a 'grace period' prior to any enforcement action." Plaintiff sought legal counsel in response to the notification, voluntarily removed certain games

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pursuant to the advice of counsel in December 2014, and continued to operate her business. On 3 March 2015, plaintiff received two similar notifications from Pitt County law enforcement. Plaintiff posted on the Facebook page for one of her businesses on 8 May 2015, “I might just let them give me a ticket so I can have my day in court,” and on 2 July 2015, “We do not have any plans of closing.” On 17 July 2015, Nash County law enforcement left a similar notification with an employee at defendant Bass’s business.

On 30 July 2015, plaintiff purchased the Nash County business from defendant Bass for \$500,000.00.¹ Defendant Boyd was not present for nor a party to the transaction, as he only supplied software and had no ownership interest in the business itself. Defendant Bass did not inform plaintiff prior to the sale that a notification of enforcement had recently been left at the business, and plaintiff had made no attempt to contact Nash County law enforcement herself to discuss the legality of the business. In her deposition testimony, plaintiff admitted that she had always checked with the chief of police before adding a new game or machine at her other businesses, but stated that she did not contact Nash County law enforcement “[b]ecause [defendant Bass] had been operating for years. He told [her] it was legal.” Plaintiff then clarified that defendant Bass’s legality representation was in reference to local zoning laws.

On 1 August 2015, plaintiff assumed ownership and operation of the Nash County business, which included entering into her own Aurora Technology software agreement without the involvement of defendant Boyd. On 17 August 2015, Aurora Technology terminated that agreement amidst speculation that all internet sweepstakes businesses located in the Eastern District of North Carolina would soon be raided and potentially shut down at the direction of the U.S. Attorney. When a representative from Aurora Technology informed plaintiff of the same, plaintiff responded by simply replacing the software on her machines. Plaintiff continued to operate the Nash County business despite having been advised by counsel as of December 2014 that the same replacement software violated the sweepstakes statute.

On 11, 16, and 22 September 2015, undercover law enforcement officers entered the Nash County business and observed the games being played on the machines located therein. The Nash County business was then raided and shut down on 28 September 2015, and on 1 October

1. Although the written “Agreement for Sale of Business” shows a total purchase price of \$20,000.00, it is undisputed that plaintiff paid \$20,000.00 by check and \$480,000.00 in cash to defendant Bass.

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2015, plaintiff was charged criminally with eight counts of violating the sweepstakes statute.

On 15 October 2015, plaintiff commenced this action by filing an initial complaint against defendant Bass, and she filed an amended complaint adding defendant Boyd as a party on 17 January 2017. In her amended complaint, plaintiff alleged that prior to discussing the possibility of her purchasing the Nash County business,

and unbeknownst to the Plaintiff, Defendants had been informed by the Nash County Sheriff's Office of their intention to take enforcement action against the [Nash County business]. . . . At no time during the negotiations process did Defendants ever inform Plaintiff of the pending enforcement action by law enforcement. Instead, they actively hid this material fact from the Plaintiff.

Plaintiff then enumerated claims for breach of contract, fraud, rescission, unfair and deceptive trade practices, punitive damages, and civil conspiracy against defendants.

On 16 February 2017, defendant Bass filed his amended answer to the complaint along with a motion to dismiss plaintiff's claims for breach of contract, fraud, and civil conspiracy pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. On 22 March 2017, defendant Boyd likewise filed his answer to the complaint along with a Rule 12(b)(6) motion to dismiss plaintiff's claims for breach of contract, fraud, and punitive damages. On 19 May 2017, defendants filed their respective motions for summary judgment on all of plaintiff's claims pursuant to Rule 56 of the Rules of Civil Procedure.

Following a 5 June 2017 hearing, the trial court entered an order granting defendants' motions. The order indicated that the trial court,

having reviewed the pleadings, the admissions, the interrogatories, the depositions with exhibits, other exhibits, and all documents and affidavits filed and submitted to the Court by the defendants and by the plaintiff, and having considered the arguments of counsel for the plaintiff and the defendants, specifically finds (i) that the subject matter of the contract between the plaintiff and the defendant Bass, to wit: an internet sweepstakes business, was an illegal activity in violation of North Carolina law, against the public policy of this State, and cannot be enforced by the Court; (ii) that any reliance by the plaintiff on any

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misrepresentation or concealment of material facts by the defendant Bass in the formation of the contract was as a matter of law not reasonable; and (iii) that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law dismissing all claims.

Plaintiff entered timely notice of appeal.

II. Standard of Review

At the outset, we note that the trial court granted both defendants' motions to dismiss pursuant to Rule 12(b)(6) as well as their motions for summary judgment pursuant to Rule 56. However, because the trial court considered matters outside of the pleadings, we limit our review to the trial court's ruling on defendants' motions for summary judgment as to all claims. *See Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E.2d 611, 627 (1979) ("A Rule 12(b)(6) motion to dismiss for failure to state a claim is indeed converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court.").

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). "A party moving for summary judgment satisfies its burden of proof (1) by showing an essential element of the opposing party's claim is nonexistent or cannot be proven, or (2) by showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Belcher v. Fleetwood Enters., Inc.*, 162 N.C. App. 80, 84, 590 S.E.2d 15, 18 (2004) (citation omitted). "Once the movant satisfies its burden of proof, the burden then shifts to the non-movant to set forth specific facts showing there is a genuine issue of material fact as to that essential element." *Id.* at 84-85, 590 S.E.2d at 18. "All facts asserted by the [nonmoving] party are taken as true . . . and their inferences must be viewed in the light most favorable to that party[.]" *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal citations omitted).

III. Analysis

We now address the issue of whether the trial court erred in granting defendants' motions for summary judgment on plaintiff's claims for

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breach of contract and rescission, fraud, unfair and deceptive trade practices, and civil conspiracy.²

A. Breach of Contract and Rescission

[1] In this portion of her brief, plaintiff focuses entirely on the trial court's finding that the subject matter of the contract at issue was illegal. She asserts that the Nash County business was not illegal as a matter of law, and that its legality was a genuine issue of material fact to be determined by a jury. Regarding her claim for rescission, plaintiff states simply that because her breach of contract claim should have been allowed to proceed, her rescission claim should likewise have been allowed to move forward.

In an action for breach of contract, the complaint must allege (1) the existence of a contract between the parties, (2) the specific provisions breached, (3) the facts constituting the breach, and (4) the damages resulting to the plaintiff from the breach. *Cantrell v. Woodhill Enterprises, Inc.*, 273 N.C. 490, 497, 160 S.E.2d 476, 481 (1968). "The [equitable] remedy of rescission, as opposed to the notion of damage, seeks to undo the transaction and return the parties to their original status." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 256, 507 S.E.2d 56, 65 (1998). "The right to rescind does not exist where the breach is not substantial and material and does not go to the heart of an agreement." *Wilson v. Wilson*, 261 N.C. 40, 43, 134 S.E.2d 240, 243 (1964).

Because plaintiff has failed to meet her burden of showing that a genuine issue of material fact exists as to the essential elements of her breach of contract claim, we conclude that summary judgment on both claims was proper.

In her complaint, plaintiff alleged only that "Defendants' failure to perform has resulted in a material breach of the contract entered into between the Plaintiff and the Defendants." Plaintiff acknowledges elsewhere in the record that she purchased the Nash County business on 30 July 2015, received all of the physical items she had expected to receive along with the purchase, and operated the business from 1 August 2015 until being shut down by law enforcement on 28 September 2015.

2. Plaintiff's claim for punitive damages cannot stand alone. See *Iadanza v. Harper*, 169 N.C. App. 776, 783, 611 S.E.2d 217, 223 (2005) ("If the injured party has no cause of action independent of a supposed right to recover punitive damages, then he has no cause of action at all." (quoting *Hawkins v. Hawkins*, 101 N.C. App. 529, 532, 400 S.E.2d 472, 474 (1991), *aff'd*, 331 N.C. 743, 417 S.E.2d 447 (1992))).

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Nowhere does plaintiff allege the specific provisions breached, nor a single fact constituting breach, by either defendant Bass or Boyd. Moreover, plaintiff has failed to show even the existence of a contract with defendant Boyd, who had no ownership interest in the Nash County business.

Given these undisputed facts, the trial court did not err in granting defendants' motions for summary judgment on plaintiff's breach of contract and rescission claims.

B. Fraud

[2] Plaintiff next contends that she sufficiently alleged each element of fraud, and that the trial court erred in finding her reliance on any misrepresentation or concealment of material facts by defendant Bass in the formation of the contract to be unreasonable as a matter of law.

The essential elements of fraud are (1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; and made with intent to deceive; (3) which does in fact deceive; (4) resulting in damage to the injured party. *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974). "Additionally, any reliance on the allegedly false representations must be reasonable." *Forbis*, 361 N.C. at 527, 649 S.E.2d at 387. "The reasonableness of a party's reliance is a question for the jury, unless the facts are so clear that they support only one conclusion." *Id.*

Here, the undisputed facts are "so clear that they support only one conclusion": that is, that any reliance by plaintiff on defendant Bass's failure to inform her of the notification of enforcement was unreasonable.

At the time plaintiff purchased the Nash County business, she had owned and operated three similar businesses located in nearby counties for approximately three years. She had received three written notifications from law enforcement informing her that all three businesses were in danger of being shut down, and she had sought legal counsel regarding the legality of her gaming software and machines. Thus, when plaintiff entered into the purchase contract with defendant Bass, she was well aware of the risks involved in operating an internet sweepstakes business. In light of her knowledge and experience, plaintiff failed to exercise reasonable due diligence when she did not seek the opinion of law enforcement regarding the legality of the Nash County business prior to purchasing it. Additionally, plaintiff cannot show that her alleged damages were caused by either defendant, as her shut-down and arrest were based on software she had installed herself after being advised by her attorney that the same software was illegal.

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Because plaintiff failed to forecast sufficient evidence to support the reasonableness and causation elements of her fraud claim, we conclude that summary judgment on this claim was proper.

C. Unfair and Deceptive Trade Practices

[3] “The elements for a claim for unfair and deceptive trade practices are (1) defendants committed an unfair or deceptive act or practice, (2) in or affecting commerce and (3) plaintiff was injured as a result.” *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 439, 617 S.E.2d 664, 671 (2005) (citation omitted).

Plaintiff’s entire argument as to her claim for unfair and deceptive trade practices spans two paragraphs and consists of four sentences. The first paragraph sets forth the elements of the claim, and the second paragraph reads as follows:

“ ‘Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts. []’ ” *Bhatti v. Buckland*, 328 N.C. 240, 243, 400 S.E.2d 440, 442 (1991) (quoting *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342 (1975)). Therefore, since it was error to dismiss [plaintiff]’s claims for breach of contract and fraud, it was likewise error to dismiss her claim for Unfair and Deceptive Trade Practices.

Error will not be presumed on appeal. “Instead, the ruling of the court below in the consideration of an appeal therefrom is presumed to be correct.” *Beaman v. Southern R. Co.*, 238 N.C. 418, 420, 78 S.E.2d 182, 184 (1953) (citations and internal quotation marks omitted). Moreover, it is the appellant’s burden to show error occurring at the trial court, and it is not the role of this Court to create an appeal for an appellant or to supplement an appellant’s brief with legal authority or arguments not contained therein. *See, e.g., Eaton v. Campbell*, 220 N.C. App. 521, 725 S.E.2d 893 (2012) (dismissing appeal taken by *pro se* appellants who offered limited and unsupported arguments in requesting relief). Accordingly, if an argument contains no citation of authority in support of an issue, the issue will be deemed abandoned. *See State v. Sullivan*, 201 N.C. App. 540, 550, 687 S.E.2d 504, 511 (2009).

Because plaintiff has failed to submit any meaningful argument as to how the trial court erred in granting summary judgment on her unfair and deceptive trade practices claim, this issue is deemed abandoned on appeal.

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D. Civil Conspiracy

[4] Similar to her argument regarding unfair and deceptive trade practices, plaintiff's argument as to her claim for civil conspiracy relies entirely on her claim for fraud. Plaintiff vaguely asserts that defendants "agreed to commit this fraud" and that plaintiff was "greatly damaged" as a result.

Because plaintiff has failed on appeal to submit any meaningful argument as to how the trial court erred in granting summary judgment on her civil conspiracy claim, this issue is also deemed abandoned.

IV. Conclusion

Plaintiff failed to meet her burden to set forth specific facts and forecast sufficient evidence of a genuine issue of material fact as to any of her claims. Accordingly, the order of the trial court granting defendants' motions for summary judgment on plaintiff's claims is hereby:

AFFIRMED.

Judges TYSON and ZACHARY concur.

LARA G. WEAVER, PETITIONER

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. COA17-828

Filed 4 September 2018

1. Public Officers and Employees—State employee—promotion not received—qualifications—findings

The administrative law judge did not err by finding that an unsuccessful applicant for a State job lacked the minimum qualifications in that she did not have supervisory experience. Even though petitioner had taken on more responsibility at times and had done a portion of the supervisor's work, she had no official managerial or supervisory role and did not evaluate, hire, or fire employees. Although petitioner pointed toward "or equivalent" language in the posting, there were several versions of the posting and the person who wrote the knowledge, skills, and ability portion of the job

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description testified that this portion of the job description never stated that an equivalency would be acceptable.

2. Public Officers and Employees—State employee—unsuccessful applicant—qualifications—findings

The administrative law judge did not err in a proceeding by a State employee who unsuccessfully sought a job promotion by finding that the focus on filling the position was more on the supervisory and managerial aspects of the position than the technical aspects. Also, testimony that someone was promoted to a supervisory position without supervisory experience was based on a ten-year-old hiring decision.

3. Evidence—hearsay—credentials of successful job applicant—business records exception

The administrative law judge did not err in an action by a State employee who was an unsuccessful candidate for a State job by admitting the successful applicant's credentials, which were presented on notes and paper the hiring officials had compiled. The evidence showed that the job applications and other information about applicant qualifications were kept in the course of a regularly conducted business activity. The focus was on the authentication of the records, including the information collected as part of the regular hiring process, not on who made them.

4. Public Officers and Employees—State employee—priority consideration—minimum qualifications

An administrative law judge did not err by concluding that a State employee (petitioner) who was an unsuccessful candidate for a State job did not have substantially equal qualifications to the successful applicant. Moreover, petitioner did not meet the minimum qualifications for the job and did not qualify for priority consideration.

Appeal by petitioner from final decision entered 12 April 2017 by Judge J. Randall May in the Office of Administrative Hearings, Johnston County. Heard in the Court of Appeals 21 February 2018.

Schiller & Schiller, PLLC, by David G. Schiller, for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph E. Elder, for respondent-appellee.

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STROUD, Judge.

Petitioner appeals from a final decision of the Office of Administrative Hearings (“OAH”) which concluded that petitioner failed to prove by a preponderance of the evidence she was significantly better qualified for a position with respondent North Carolina Department of Health and Human Services (“NCDHHS”) than the selected candidate, because she did not meet the minimum requirements for the position. On appeal, petitioner raises issue with several findings and argues that the Administrative Law Judge (“ALJ”) erred in concluding that she did not have substantially equal qualifications as the selected candidate. After review, we affirm the final decision.

Background

Petitioner began working for NCDHHS in January of 2005 in the Microbiology Unit of the State Laboratory of Public Health. She held the position of a Laboratory Specialist and worked on the Special Bacteriology bench in the lab, one of many benches within the lab on which petitioner was trained. Petitioner worked for the State Lab for 11 years.

In January 2015, petitioner applied for a Medical Laboratory Supervisor II position, and when she applied she was a career state employee. Dr. Samuel Merritt, the former unit supervisor for the Microbiology Unit with over 30 years of experience in laboratory work, was assigned as the hiring manager for the Medical Supervisor II position. He assessed petitioner’s application. While he found she had much experience with the day-in and day-out routine of the lab and its benches, she had no supervisory experience in the job she held at the lab. Dr. Merritt, therefore, did not find her to be the best fit for the job amongst the other applicants who applied for the role of Medical Supervisor II. Dr. Merritt also reviewed Thomas Lawson’s application. Mr. Lawson was not a State employee when he applied but he possessed the educational, work experience, and supervisory requirements that the hiring committee found necessary to perform the job. He had a supervisory role in a public health lab in Maryland overseeing six to twelve employees. He also had conducted testing in microbiology which was of clinical importance. Lawson had a degree in biology and a Master’s degree in biotechnology. Given the totality of Lawson’s application, the hiring officials considered him to be the best candidate out of the applications received. After conducting interviews, Merritt informed Lawson he was selected for the job, and Lawson started his role as Medical Supervisor II in May of 2016.

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On 1 November 2016, petitioner filed her petition with the Office of Administrative Hearings, arguing that NCDHHS failed to give petitioner promotional priority over a less qualified applicant who was not a career State employee and that she should have been given veteran's preference because she was the spouse of a disabled veteran. A hearing on the matter was heard before the ALJ on 14 and 15 February 2017. Following the hearing, on 12 April 2017, the ALJ entered his final decision, concluding that petitioner failed to prove by a preponderance of the evidence she was significantly better qualified for the position than the selected candidate and that she did not meet the minimum requirements for the position, so she was not qualified for veteran's preference. Petitioner timely appealed to this Court.

Analysis

On appeal, petitioner contends that the ALJ erred in making numerous findings and in concluding that she did not have substantially equally qualifications as the selected candidate, Mr. Lawson.

I. Standard of Review

"N.C. Gen. Stat. § 150B-51 (2015) governs the scope and standard of this Court's review of an administrative agency's final decision. The standard of review is dictated by the substantive nature of each assignment of error." *Watlington v. DSS Rockingham County*, __ N.C. App. __, __, 799 S.E.2d 396, 400 (2017) (citations omitted). Under North Carolina General Statutes § 150B-51(b):

The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

... With regard to asserted errors pursuant to subdivisions

- (1) through (4) of subsection (b) of this section, the court

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shall conduct its review of the final decisions using the *de novo* standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(b)-(c) (2017). Thus,

[i]t is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test. The court engages in *de novo* review where the error asserted is pursuant to § 150B-51(b)(1), (2), (3), or (4).

Watlington, __ N.C. App. at __, 799 S.E.2d at 400 (citations and quotation marks omitted).

Under the whole record test, [t]he court may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence – that which detracts from the agency's findings and conclusions as well as that which tends to support them – to determine whether there is substantial evidence to justify the agency's decision. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion.

Harris v. NC Dept. of Public Safety, __ N.C. App. __, __, 798 S.E.2d 127, 133 (citation, quotation marks, and brackets omitted), *aff'd per curiam*, 370 N.C. 386, 808 S.E.2d 142 (2017).

II. Lack of Minimum Qualifications for the Supervisor II Position

[1] Petitioner first argues that the ALJ erred in making these findings related to whether petitioner had the necessary supervisory experience for the position:

23. The minimum education and experience requirements for the MLS II position required the successful candidate to have a Bachelor's degree in medical technology, chemistry, or biological science, and four years of laboratory experience, one of which is in a supervisory capacity.

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24. The [Knowledge, Skills and Abilities (KSAs)] for the MLS II position required the successful applicant to have a background in microbiology, including basic lab methods for cultivating and identifying microorganisms and microscopic analysis. As the hiring manager, Dr. Merritt developed the KSAs required for the MLS II position.

. . . .

29. The KSAs established by the hiring manger specifically required the successful candidate to have supervisory and management experience. Petitioner testified that she did not have such experience; therefore, she did not meet the minimum qualifications for the Med Lab Supervisor II position.

30. Though petitioner initially indicated that she had supervisory experience on her application, her own testimony made it clear that she did not have this minimum experience.

31. Petitioner's application was initially screened into the pool of minimally qualified applicants because she inaccurately stated in her application that she had supervisory experience. Upon review by Dr. Merritt, who was familiar with her work, an appropriate determination was made that Petitioner did not meet the minimum job qualifications because she did not have the required management and supervisory experience.

. . . .

40. Petitioner was not included in the most qualified pool of candidates. She did not have the necessary laboratory experience in a supervisory and management capacity.

Petitioner contends that the ALJ erred in making the above findings of fact regarding her experience and lack of a supervisory role at the lab. Ultimately, the ALJ found that her experience as a Lab Tech in the State lab for 11 years, paired with her education, without any managerial role, did not amount to the minimum requirements for the job posting.

Petitioner argues that she covered several other benches during the months between when the position became vacant and was filled and that the hiring committee did not properly weigh the evidence of her supervisory role in the lab. She argues that she "checked the work of the people on the other benches in the unit" and had to write her own evaluations and conduct monthly quality control. Thus "when [petitioner]

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applied for the Supervisor II position, she had been trained on all the benches in the Microbiology Unit, could work all of them, and had done quality control on all of the benches.” But even if petitioner did take on more responsibility with that vacancy, she still had no official managerial or supervisory role. She did a portion of the work a supervisor would do, such as overseeing the work on the benches, but she did not hire or fire employees.

When asked at the hearing whether she ever held a position with a supervisory title to it, petitioner responded, “No.” Petitioner was again asked “[d]id you have two years of supervisory experience at the time you applied?” and she responded, “No.” And petitioner acknowledged at the hearing that she made no hiring decisions in her position and that she had never been assigned to evaluate other employees or evaluated other employees. But on her application, when asked whether she had supervisory and management experience, petitioner wrote “Yes.” This evidence supports the findings as entered by the ALJ – and in turn provides substantial evidence to justify the agency’s final decision that petitioner did not meet the minimum qualifications for the position as posted. *See Harris*, __ N.C. App. at __, 798 S.E.2d at 133.

Petitioner also contends that the ALJ ignored the full text of the job description, because the description included the language “or an equivalent combination of education and experience.” There were apparently several versions of the job posting listed in various places at different times, but petitioner argues that all versions contained this equivalency language. For example, petitioner’s Exhibit 4 refers to a job bulletin posting for the position which listed as minimum education and experience requirements a “Bachelor’s degree . . . and four years of laboratory experience in the assigned area, one of which is in a supervisory capacity; or an equivalent combination of education and experience[.]” Petitioner’s Exhibit 8 indicated that the “Education and Experience Required” section of the job posting for the position stated:

Preferably graduation from a four-year college or university with a B.A./B.S. or equivalent degree in medical technology, microbiology, or biological sciences. And three years of supervisory laboratory experience, preferably microbiology-related.

Alternatively, an equivalent combination of education and experience that includes an Associate degree in medical technology, microbiology or microbiology-related. Coursework must include at least one class in general

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microbiology or basic medical microbiology. Additional courses in biochemistry, chemistry, biology, immunology, or microbiology are preferred.

Continuing education courses in any of the above subjects would also be beneficial.

Position requires a background in microbiology with at least 3 years of work experience in supervision and management. . . .

But petitioner has not shown that the trial court's findings regarding her experience as it related to that required for the position were erroneous. Petitioner's application erroneously stated that she had supervisory experience. She later testified that she has never held a supervisory title. Moreover, Dr. Merritt testified that he wrote the knowledge, skills, and ability section ("KSAs") of the job description, and that portion of the job description never stated an equivalency would be acceptable. The KSA was consistently written to reflect a requirement that the applicant have knowledge and background "in supervision and management." The ALJ did not err in ultimately concluding that petitioner did not meet this requirement. The trial court's findings are supported by the evidence. *See, e.g., Teague v. Western Carolina University*, 108 N.C. App. 689, 692-93, 424 S.E.2d 684, 686-87 (1993) ("The evidence presented in the case at hand does not lead this Court to the conclusion that the Commission's decision to uphold Mr. McClure's determination was patently in bad faith or whimsical. Mr. McClure had to make his decision based on the qualifications he found in the applications and elicited during the interviews. Ms. Teague's application did not state that she held an advanced degree, nor did it contain any references to her relevant and substantial experience. . . . Based upon the information he had before him, Mr. McClure reasonably concluded that Ms. Teague's qualifications were not 'substantially equal' to Ms. Murchison's." (Citation and quotation marks omitted)).

III. Additional Findings Regarding Required Supervisory Experience

[2] Petitioner also contends that the ALJ erred in making these findings, Findings of Fact No. 34, 39, and 45, in relation to the qualifications sought for the position:

34. The MLS II position has both technical and supervisory aspects; however, the supervisory responsibilities are primary and present in the other responsibilities of the job. While the MLS II would perform some lab testing, this was not the expected primary role. Specialists are the

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subject matter experts and expected to perform the bench testing and to trouble shoot issues arising on the bench. The MLS II would oversee and coordinate these activities.

....

39. At the time Dr. Merritt was hiring for the MLS II position, he was looking for a candidate with previous supervisory experience. While the candidate needed broad knowledge of the testing areas that would be supervised, the candidate did not need to be an expert in performing the various tests.

....

45. Shadia Rath was hired as a Med Lab Supervisor II without prior supervisory experience. This was in the bioterrorism area that was previously part of the microbiology unit. Rath served in this position during 2004-2007, nine years prior to the posting of the position at issue in this case. The fact that she was hired nine years ago, by a different supervisor into a different Med Lab Supervisor II position, is not relevant to a determination of whether Petitioner met the minimum qualifications for the Med Lab Supervisor II position at issue in this case.

In relation to Finding of Fact No. 34, testimony from Dr. Merritt and Dr. Scott Zimmerman supported the ALJ's finding that the focus in filling the Supervisor II position was on the supervisory and managerial aspects of the position, more so than the technical aspects. And this was reflected in the job posting description, which reiterated a need for supervisory and management experience. Finding of Fact No. 39, which focuses specifically on what Dr. Merritt was looking for in candidates, again reiterates the need for supervisory experience. This finding is supported by his testimony.

On Finding of Fact No. 45, Ms. Rath testified that she served in a Supervisory II position from 2004 to 2007. She also testified that when she was promoted to the Supervisor II position, she had never held a supervisory title. But Ms. Rath was hired almost a decade earlier, by someone other than Dr. Merritt, and no evidence was presented of the job posting for the Supervisor II position at the time she applied or whether it listed a requirement of prior supervisory experience. Therefore, we hold these findings are supported by substantial evidence.

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IV. Business Records Exception to Hearsay

[3] Petitioner next contends the ALJ erred in making findings of fact No. 28, 43, and 46 – which pertain to Mr. Lawson’s credentials – because they are based on hearsay. Petitioner argues that Lawson’s credentials are all hearsay because the credentials were presented on notes and paper the hiring officials – including Dr. Merritt – compiled during Lawson’s interview for the Medical Supervisor II job. The ALJ found as fact:

28. Thomas G. Lawson met the minimum education requirements as he has a Bachelor’s degree in biology and a Master’s degree in biotechnology. Lawson also had several years of laboratory experience in a supervisory capacity. This exceeded the MLS II position requirement for at least a year of laboratory experience in a supervisory capacity.

....

43. Review of Lawson’s application revealed that he exceeded the minimum qualifications for the MLS II position:

a. Lawson oversaw the laboratory operations for a clinical and environmental testing laboratory. He designed, implemented, and managed components for quality assurance programs.

b. Lawson developed and maintained standard operating procedures; competency assessment for testing; proficiency testing; corrective action reporting; specimen turnaround time optimizations; compliance auditing; and new assay performance verification.

c. Lawson hosted and directed federal auditors during Clinical Laboratory Improvement Amendment inspections.

d. Lawson was involved in budgeting activities and established relationships within the biotech industry. He communicated with stakeholders, public health officials, vendors, and news media.

e. Lawson conducted recruitment, selection, and orientation procedures for new employees; conducted employee performance evaluations; and managed

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employee promotions and discharges. Lawson provided technical oversight and training of between 6 and 12 scientists in several testing areas.

f. Lawson had several years of testing experience as a microbiologist. He conducted molecular testing for the detection of bio-threat agents and infectious organisms. He performed quality control for testing he conducted. He worked as a senior microbiologist at the Texas Department of State Health Services performing biological tests to detect infectious organisms using testing techniques utilized in the SLPH.

....

46. Lawson was offered the MLS II position and he accepted the offer. He started in the MLS II position in May 2016. Lawson was not a career state employee of the State of North Carolina at the time he was hired into the MLS II position. Dr. Merritt, in conjunction with the interview team, concluded that Lawson was the most qualified candidate; and that he was significantly better suited to the position than Petitioner. Lawson possessed the laboratory experience in a supervisory and management capacity that Petitioner did not have.

At the OAH hearing, petitioner objected several times to the admission of evidence regarding Lawson's credentials, arguing this evidence was hearsay because Mr. Lawson was not present to testify. Hearsay is defined as, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2017). "However, statements offered for other purposes are not hearsay." *Taylor v. Abernethy*, 174 N.C. App. 93, 99, 620 S.E.2d 242, 246 (2005) (citations, quotation marks, and brackets omitted). Also, hearsay evidence may be admissible if it falls under one of the exceptions to the hearsay rule listed in North Carolina Rules of Evidence Rule 803. *See* N.C. Gen. Stat. § 8C-1, Rule 803 (2017). Business records are one such exception. *See, e.g.*, N.C. R. Evid. Rule 803 (6) ("The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (6) Records of Regularly Conducted Activity.").

Here, the ALJ overruled Petitioner's objection based upon the "records of regularly conducted activity" exception to the hearsay rule

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because Mr. Lawson's job application and the hiring officials' notes taken during the interview about Lawson's credentials were business records kept as a part of the usual hiring process. As noted above, records of regularly conducted activity are addressed in Rule 803(6), which states,

A memorandum, report, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if (i) kept in the course of a regularly conducted business activity and (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit or by document under seal . . . made by the custodian or witness, unless the source of information or the method or circumstances or preparation indicate lack of trustworthiness.

Id.

NCDHHS presented several exhibits which petitioner claims are inadmissible hearsay, including Mr. Lawson's application for the job and interview notes, which also include information on his credentials and experience. Petitioner's first objection came after Ms. Shanda Snead began testifying about Mr. Lawson's education based upon his job application. Ms. Snead was the "recruiter for Public Health," a department within NCDHHS that includes the State Lab of Public Health. Her job was to

work with the hiring managers when there's a vacancy or a new position that needs to be filled. In going through that process, I would create the posting, working with the applicant tracking system, requesting – receiving the applications, reviewing them, screening them, and then sending them the qualified applicants and then following up with them later on if there's questions with the hiring, interview process.

She testified about the usual process used by NCDHHS for hiring, including the entire process of posting the job, collecting information on the applicants, screening the applicants, and selecting the applicant. The information is collected in the "NEOGOV system[,]” which is an electronic system. She would then screen the applications for minimum qualifications, and those that met the minimum job qualifications would be transmitted to the hiring manager, who is normally the supervisor

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who will decide which applicants to interview and ultimately hire. She described specifically the job posting for the position at issue in this case, as well as the receipt and screening of the applications, including those from Mr. Lawson and petitioner. Both of these applications were collected and transmitted to the hiring manager – in this case, Dr. Merritt – in the usual manner.

Petitioner objected to this testimony and the job application as hearsay because “Mr. Lawson is not here to verify and – which statement – call for the truth of the matter, sir.” Counsel for respondent noted that the job application was admissible hearsay under the business records exception. He noted that the application and information submitted to the hiring manager comes from the applications submitted by the applicants through the NEOGOV system.

Business records made in the ordinary course of business at or near the time of the transaction involved are admissible as an exception to the hearsay rule if they are authenticated by a witness who is familiar with them and the system under which they are made. The authenticity of such records may, however, be established by circumstantial evidence. There is no requirement that the records be authenticated by the person who made them.

State v. Wilson, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985) (citations omitted).

The evidence here showed that the job applications and other information about the qualifications of the job applicants, including Mr. Lawson, were “(i) kept in the course of a regularly conducted business activity,” N.C. R. Evid. 803(6), specifically, NCDHHS’s process for posting new jobs and hiring new employees. “[I]t was the regular practice of” NCDHHS to collect applications in the NEOGOV system and to use this data compilation to make the hiring decisions. *See id.* Ms. Snead was a “custodian or other qualified witness” who testified about the business practice of collecting the applications and transmitting them to the hiring manager. *Id.* Therefore, the ALJ correctly overruled petitioner’s objection based on hearsay, since Mr. Lawson’s application and the other records regarding his qualifications were business records admissible under Rule 803(6). *Id.*

This situation is similar to *State v. Cagle*, 182 N.C. App. 71, 76, 641 S.E.2d 705, 709 (2007), where the Director of Security for Biltmore Mall testified about the Mall’s “procedures and processes for handling problematic checks” in a prosecution for obtaining property by

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writing worthless checks. The defendant objected to her testimony about the worthless checks since “she did not witness their processing at the bank.” *Id.* But this Court held that her testimony about the bad checks was admissible under Rule 803(6) because she testified about “the Mall’s handling of the checks” based upon her first-hand knowledge of the Mall’s procedures. *Id.*

The same analysis would apply to the interview notes taken during Mr. Lawson’s interview for the job. These notes were a “memorandum, report, record, or data compilation” of the “opinions” of the interviewer “made at or near the time” of the interview, and it was also part of the regular practice of NCDHHS to keep a record of the interview notes. *See* N.C. R. Evid. 803(6). In addition, essentially the same information was included in the interview notes as in Mr. Lawson’s application. *See generally* *Thanogsinh v. Board of Educ.*, 462 F.3d 762, 775-76 (7th Cir. 2006) (“The district court abused its discretion when it excluded the interviewers’ score sheet from Cain’s interview and the handwritten notes on that sheet. This document is admissible under the business record exception to the hearsay rule. . . . In this case, Cain’s score sheet is precisely the type of memorandum or record that falls within the ambit of the business record exception.” (Citations, quotation marks, and footnote omitted)).

Petitioner contends that when Mr. Lawson completed his application, he did not work for NCDHHS, so any document he created could not fall under the business record exception to the general rule of exclusion of hearsay. But the focus is not on Lawson’s position, but on the authentication of the records, including the information collected by NCDHHS as part of its regular hiring process. “There is no requirement that the records be authenticated by the person who made them.” *Wilson*, 313 N.C. at 533, 330 S.E.2d at 462. Petitioner’s argument that Mr. Lawson did not create the record has the same flaw as the defendant’s argument in *Cagle*, as noted above, that the Mall Directory of Security “did not witness” the processing of the checks at the bank. *Cagle*, 182 N.C. App. at 76, 641 S.E.2d at 709. Petitioner has not noted any reason for exclusion of this information on the theory that “the source of information or the method or circumstances of preparation indicate lack of trustworthiness.” N.C. R. Evid. Rule 803(6). In addition, Dr. Merritt’s interviews were taken in the usual course of his role as hiring manager to interview applicants for the open position. Dr. Merritt made a “data compilation” of his “opinions” regarding the qualifications of the applicants, including Mr. Lawson, “at or near the time” of the interview, and these were kept as part of the “regular practice” of NCDHHS to keep

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records of the hiring process. *Id.* Both Dr. Merritt and Ms. Snead testified at length about this process. Therefore, the ALJ correctly overruled Petitioner's objection to the testimony and evidence regarding Mr. Lawson's qualifications as they were shown on his application and as reflected in Dr. Merritt's interview notes when he was making the hiring decision. In addition, the ALJ's findings of fact regarding Mr. Lawson's credentials and experience were supported by the record.

V. Substantially Equal Qualifications

[4] Finally, petitioner argues that the ALJ erred in concluding that she did not have substantially equal qualifications as Mr. Lawson and in failing to give her priority consideration as a career State employee for the position. Because we have concluded that the ALJ did not err in finding that petitioner failed to meet the minimum qualifications for the position, she also did not qualify for priority consideration. Therefore, it was not error for the ALJ to decline to give her priority consideration as a career State employee, as an employee must meet the minimum qualifications for the position for the priority to apply. *See* 25 N.C.A.C. 01H.0635(a) ("The employee or applicant must possess at least the minimum qualifications set forth in the class specification of the vacancy being filled.").

Conclusion

We affirm the final decision of the Office of Administrative Hearings.

AFFIRMED.

Judges DAVIS and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 SEPTEMBER 2018)

CHAPMAN v. PIMENTEL No. 18-121	Wake (15CVD6673)	Vacated and Remanded
IN RE A.C-M. No. 18-154	Alexander (14JT28-29)	Affirmed
IN RE A.S. No. 18-120	Cumberland (17JA60-66)	Affirmed
IN RE B.D. No. 18-288	Chatham (16JT35) (16JT36)	Dismissed in Part; Affirmed in Part.
IN RE C-R.D.G. No. 18-148	Mecklenburg (15JA4)	Reversed and Remanded
IN RE D.D. No. 18-438	Mecklenburg (15JT671) (15JT672)	Affirmed
IN RE D.K. No. 17-1338	Onslow (16JB355)	Reversed
IN RE ESTATE OF QUATTLEBAUM No. 17-591	Brunswick (14E929)	Affirmed
IN RE F.A.M. No. 18-284	Onslow (16JT365)	Affirmed
IN RE J.D.S. No. 18-153	Mecklenburg (15JT192-193)	Affirmed
IN RE J.E. No. 17-1345	Mecklenburg (16JRI8)	Affirmed
IN RE L.J. No. 17-1431	Robeson (15JT197-198)	Vacated and Remanded
IN RE M.J.J.M. No. 18-289	Buncombe (14JT224)	Affirmed
IN RE T.E.G. No. 18-336	Gaston (16JT33)	Vacated and Remanded
IN RE T.L.S. No. 18-278	Sampson (16JA48-51)	Affirmed in Part and Reversed in Part

NORTH v. McRAE No. 17-698	Richmond (16CVS653)	Affirmed
SLADE v. PETTY No. 17-1276	Alamance (15CVS911)	Affirmed
STATE v. CHISHOLM No. 18-23	Mecklenburg (15CRS243049) (15CRS243051)	No Error
STATE v. DRAVIS No. 18-76	Wake (16CRS208474)	Reversed
STATE v. HAYES No. 17-1420	Rowan (16CRS2357) (16CRS51544) (16CRS51546)	No Error
STATE v. JOHNSON No. 17-1306	Cumberland (13CRS50796)	No Error
STATE v. KEELS No. 18-170	Wake (16CRS213363-64)	Dismissed
STATE v. LOCKLEAR No. 17-1332	Johnston (16CRS51182) (16CRS51228)	No error in part, dismissed in part
STATE v. MALDONADO No. 17-643	Durham (15CRS2646-47) (15CRS55558-59)	No Error
STATE v. MILLER No. 16-424-2	Guilford (14CRS71249)	Dismissed
STATE v. MILLER No. 16-1206-2	Guilford (13CRS89957)	No Error
STATE v. PEREZ No. 17-759	Buncombe (11CR59960) (16CR85332)	Affirmed
STATE v. STRICKLAND No. 17-938	Surry (13CRS54409-10) (16CRS764)	No Error
STATE v. VALLEJO No. 17-1292	Wake (14CRS224764) (14CRS224766) (15CRS52-55)	No Error

STATE v. WALKER No. 17-1167	Henderson (15CRS54765)	No Error
STATE v. WALTON No. 17-1359	Chowan (14CRS50403-04)	Reversed; Remanded
STATE v. WATSON No. 17-833	Johnston (16CRS53002-04)	Vacated in part; Dismissed in part; Affirmed in part; No error in part.
STATE v. WESTBROOK No. 18-32	Forsyth (16CRS57045)	Reversed
STATE v. WHITE No. 18-39	Durham (14CRS56324)	Reversed
STATE v. WHITE No. 18-36	Carteret (15CRS53113)	No error in part; No plain error in part.

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[261 N.C. App. 311 (2018)]

PAMELA C. BARRETT, INDIVIDUALLY AND AS EXECUTOR OF THE
ESTATE OF DONALD COLLINS CLEMENTS, JR., PLAINTIFF

v.

NANCY COSTON, DEFENDANT

No. COA18-16

Filed 18 September 2018

1. Real Property—Statute of Frauds—applicability—agreement to devise house

Plaintiff did not prevail in her argument that her deceased brother intended to leave her his house pursuant to an oral agreement, or in her request for equitable relief on multiple bases, because the Statute of Frauds requires any agreement to devise real property to be in writing.

2. Unjust Enrichment—proper basis—benefit conferred

Plaintiff failed to state a claim that her deceased brother's sister-in-law (defendant) was unjustly enriched when she was deeded the brother's condominium and then inherited the brother's house upon his death despite an apparent oral agreement that plaintiff would receive the house. Plaintiff failed to make the necessary showing that she conferred a benefit on defendant since she did not own the house or otherwise have any legal right to it.

3. Equity—constructive trust—proper basis—necessary elements

Plaintiff failed to state a claim that her deceased brother's sister-in-law (defendant), to whom he devised his house, held the house in constructive trust for plaintiff due to an apparent oral agreement that the brother intended plaintiff to have the house. A constructive trust cannot be based on an unenforceable oral agreement to devise real property, and plaintiff failed to show that defendant acquired the house through fraud, breach of duty, or other wrongdoing.

4. Reformation of Instruments—mutual mistake—sufficiency of facts

Plaintiff failed to show that her deceased brother's 2016 deed conveying his condominium to his sister-in-law (defendant) should be reformed based on mutual mistake where he made an oral agreement to give plaintiff his house upon his death but never changed his 2012 will, which left the house to defendant. Plaintiff did not rebut the presumption that her brother understood the consequences of the deed, which was only effective to convey the condo to

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defendant but not to convey the house to plaintiff, nor did she show that any other mistake was made in the property conveyances.

Appeal by Plaintiff from an order entered 21 September 2017, as amended 25 September 2017, by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 8 August 2018.

Harvell and Collins, P.A., by Russell C. Alexander and Wesley A. Collins, for the Plaintiff-Appellant.

Sumrell, Sugg, Carmichael, Hicks and Hart, P.A., by Ross T. Hardeman, for the Defendant-Appellee.

DILLON, Judge.

Pamela C. Barrett (“Plaintiff”) appeals from an order granting Nancy Coston’s (“Defendant”) motion to dismiss and denying Plaintiff’s motion for summary judgment as moot. After careful review, we affirm the decision of the trial court.

I. Background

This case concerns two pieces of real property, (1) a house in Atlantic Beach (“the House”) and (2) a condominium unit in Indian Beach (“the Condo”), each formerly owned by Donald C. Clements, Jr. (the “Decedent”), who died in 2016.

Plaintiff is the Decedent’s sister. Defendant is the Decedent’s wife’s sister.

The Decedent and his wife did not have children. They owned the House and the Condo. At some point, the Decedent’s wife died, at which point the Decedent became the sole owner of the House and the Condo.

In 2012, the Decedent executed a will (the “2012 will”) which expressly left the House to Defendant (his wife’s sister) and which left the residue of his estate (which, as of 2012, would have included the Condo) to Plaintiff (his sister).

There was evidence that sometime after 2012, but prior to the Decedent’s death in 2016, the Decedent had verbal communications with Plaintiff and Defendant to change who would ultimately receive the House and who would receive the Condo. There was evidence that the Decedent gave Defendant the choice between the House and the Condo and that Defendant told the Decedent that she preferred

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the Condo. There was evidence of an oral agreement or understanding that Defendant would receive the Condo and Plaintiff would receive the House, contrary to the terms of the Decedent's 2012 will.

In any event, in June 2016, five months before his death, the Decedent executed and delivered a deed conveying the Condo to Defendant (the "2016 deed"). But the Decedent never executed a deed conveying the House to Plaintiff nor did he ever amend his will to leave the House to Plaintiff rather than to Defendant.

In December 2016, the Decedent died. Therefore, as a result of the 2012 will, Defendant received the House. And as a result of the deed, Defendant also received the Condo. Plaintiff only received the property that remained in the residue of the Decedent's estate.

Plaintiff commenced this action claiming that she is entitled to the House, as this was the Decedent's intent.

Defendant moved to dismiss Plaintiff's action, and Plaintiff moved for partial summary judgment. After a hearing on the matter, the trial court entered an order granting Defendant's motion to dismiss and denying Plaintiff's motion for partial summary judgment. Plaintiff timely appealed.

II. Discussion

On appeal, Plaintiff challenges the trial court's order dismissing her claims. At the outset, we note that the trial court, in its order, stated that it considered not only the pleadings, but also other materials presented by the parties, which included a number of affidavits. Accordingly, Defendant's Rule 12(b)(6) motion to dismiss is more properly characterized as a Rule 56 motion for summary judgment. See N.C. R. Civ. P. 12(b) (stating that if "matters outside the pleadings" are presented and not excluded by the court, the motion [to dismiss] shall be treated as one for summary judgment and disposed of as provided in Rule 56"). Our standard of review of an appeal from summary judgment "is de novo; [and that] such judgment is appropriate only when the record shows that there is no genuine issue of material fact and that any party is entitled to judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (internal marks omitted).

[1] Plaintiff argues that there is an issue of fact that she is entitled to the House, notwithstanding the 2012 will where the Decedent left the House to Defendant. Plaintiff bases her argument on three separate legal theories discussed below. However, all three theories are based on parol evidence, namely, oral communications among Plaintiff, Defendant, and

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the Decedent in which there was allegedly some agreement or understanding among the three that Plaintiff would receive the House and Defendant would receive the Condo. It may be quite probable that the Decedent *intended* for Plaintiff (his sister) to receive the House and Defendant (his wife's sister) to receive the Condo, and *not* for Defendant to receive both. But, for the following reasons, we must affirm the order of the trial court, which concluded that Defendant is the lawful owner of both properties.

First, we conclude that Plaintiff's arguments all run counter to our Statute of Frauds, codified in N.C. Gen. Stat. § 22-2. Defendant's title to the Condo and title to the House are based on written instruments signed by the Decedent; namely, her title to the Condo is based on the 2016 deed, and her title to the House is based on the 2012 will. However, Plaintiff's title to the House, according to her complaint, is based entirely on parol evidence. Our Statute of Frauds, though, requires that "[a]ll contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." N.C. Gen. Stat. § 22-2 (2015). As it has been said:

There is no stake for which men will play so desperately. In men and nations there is an insatiable appetite for lands, for the defence or acquisition of which money, and even blood, sometimes are poured out like water. The evidence of land title ought to be as sure as human ingenuity can make it. But if left to parol, nothing is more uncertain, whilst the temptations to perjury are proportioned to the magnitude of the interest. The infirmity of memory, the honest mistakes of witnesses, and the misunderstanding of parties, these are the elements of confusion and discord which ought to be excluded.

James A. Webster, Jr. et al., *Webster's Real Estate Law in North Carolina* § 9.06 (2018), (quoting *Moore v. Small*, 19 Pa. 461, 465 (1852)).

Our Supreme Court has held that an agreement to devise real property falls within the Statute of Frauds. *Jamerson v. Logan*, 228 N.C. 540, 542, 46 S.E.2d 561, 563 (1948). As such, as our Supreme Court has held, "an oral contract to convey or to devise real property is void by reason of the statute of frauds." *Pickelsimer v. Pickelsimer*, 257 N.C. 696, 698, 127 S.E.2d 557, 559 (1962).

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[2] Plaintiff claims she should receive the House based on a theory that Defendant has been unjustly enriched. Our Supreme Court has held that “a person who has been unjustly enriched at the expense of another is required to make restitution to the other.” *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 555-56 (1988). Plaintiff contends that Defendant has been unjustly enriched at her expense because Defendant received the House which should have been left to Plaintiff.

Our Supreme Court, though, has held that to make out a claim for unjust enrichment, the plaintiff must show that she conferred a benefit on the other party. *Id.* But, here, all the evidence showed that Plaintiff did not confer any benefit on Defendant. Plaintiff did not own the House. She had no legal right to the House based on some oral promise by the Decedent that he would leave it to her. Rather, the benefit was allegedly conferred upon Defendant by the Decedent.

We therefore conclude that Plaintiff’s claim based on unjust enrichment fails as a matter of law.

[3] Plaintiff next claims that Defendant merely holds the House in constructive trust for her. Generally, a constructive trust is “imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder *acquired* through fraud, breach of duty or some other circumstance making it inequitable for [her] to retain it against the claim of the beneficiary of the constructive trust.” *Roper v. Edwards*, 323 N.C. 461, 464, 373 S.E.2d 423, 424-25 (1988) (emphasis added) (citation omitted). But a constructive trust cannot be based upon an unenforceable oral agreement. *Walker v. Walker*, 231 N.C. 54, 56, 55 S.E.2d 801, 802 (1949). Here, Plaintiff’s evidence failed to show that Defendant *acquired* the House through fraud, breach of duty, or other wrongdoing. Rather, she received it through a legacy in the Decedent’s 2012 will. When the Decedent executed the 2016 deed, conveying the Condo to Defendant, the Decedent still owned the House. The House was his to do with as he pleased. He could have given it or left it to Plaintiff. He chose not to deed it to Plaintiff during his lifetime, and he chose not to modify his 2012 will. We, therefore, conclude that the trial court correctly determined that there was no constructive trust imposed through the 2012 will as a matter of law.

[4] Finally, Plaintiff argues that the 2016 deed should be reformed based on mutual mistake. We have held that “[m]istake as a ground for relief should be alleged with certainty, by stating the facts showing mistake.” *Van Keuren v. Little*, 165 N.C. App. 244, 249, 598 S.E.2d 168, 171 (2004). Our Supreme Court has held that:

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The party asking for relief, by reformation of a deed or written instrument, must allege and prove, first, that a material stipulation, as alleged, was agreed upon by the parties to be incorporated in the deed or instrument as written; and, second, that such stipulation was omitted from the deed or instrument as written by *mistake, either of both parties, or of one party, induced by the fraud of the other, or by the mistake of the draftsman*. Equity will give relief by reformation only when a mistake has been made, and the deed or written instrument, because of the mistake, does not express the true intent of both parties. The mistake of one party to the deed or instrument alone, not induced by the fraud of the other, affords no ground for relief.

Matthews v. Shamrock., 264 N.C. 722, 725, 142 S.E.2d 665, 668 (1965).

Here, Plaintiff does not allege that the Decedent had intended to include in the 2016 deed a stipulation conveying the House to Plaintiff and that such stipulation was left out by mistake. Indeed, only Defendant is listed as a grantee. She only alleges that the Decedent was somehow mistaken that executing the 2016 deed was all he needed to do to carry out the entirety of the purported agreement between the parties.

We conclude that the evidence raises no genuine issue of fact to rebut the presumption that the Decedent knew that the 2016 deed was only effective to convey the Condo to Defendant and that it did not convey the House to Plaintiff. All the evidence shows that he intended to convey the Condo to Defendant and that this conveyance was not a mistake. Rather, the “mistake” might have been that the Decedent *thought* his 2012 will already left the House to Plaintiff; or the mistake might have been that the Decedent never got around to amending his 2012 will. Maybe the Decedent made no mistake at all, but that he simply changed his mind and decided to leave both the House and the Condo to Defendant. In any case, Plaintiff has failed to create an issue regarding her claim based on mutual mistake.¹

III. Conclusion

We are certainly sympathetic to Plaintiff’s position. It seems likely that the Decedent meant to leave Plaintiff the House but that he simply

1. Plaintiff also made a claim for punitive damages. But as she has failed to prove compensatory or nominal damages, her claim for punitive damages must fail. N.C. Gen. Stat. § 1D-15(a).

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never got around to change his will or execute a deed to carry out this intent. It may be that her brother thought that he already had taken care of it. But, under the facts of this case, there is simply no remedy available to Plaintiff. Through the 2016 deed, Defendant became the legal owner of the Condo, as was the clear intent of the Decedent. And when the Decedent died later in 2016, Defendant became the legal owner of the House, by virtue of the Decedent's 2012 will. There is no evidence that Defendant, otherwise, acquired the House through fraud or the breach of some duty. Our law and strong public policy demand that we enforce the 2012 will and the 2016 deed as written, notwithstanding parol evidence suggesting that the Decedent, at some point late in his life, had expressed an intention that Plaintiff would receive his House at his death.

AFFIRMED.

Judges DAVIS and INMAN concur.

BURTON CONSTRUCTION CLEANUP & LANDSCAPING, INC.
AND CHARLES BURTON, PLAINTIFFS

v.

OUTLAWED DIESEL PERFORMANCE, LLC, AND WILLIAM DANIEL BROWN,
AND GRANT BROWN, DEFENDANTS

No. COA17-1424

Filed 18 September 2018

1. Appeal and Error—record on appeal—omission of summary judgment order—preclusion of appellate review

Plaintiffs' argument regarding the trial court's denial of their motion for summary judgment was dismissed where plaintiffs failed to include a copy of the order denying summary judgment in the record on appeal, precluding appellate review.

2. Appeal and Error—record on appeal—omission of trial transcript—preclusion of appellate review

Plaintiffs' failure to include the trial transcript in the record on appeal precluded appellate review of their argument concerning entry of directed verdict.

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3. Attorney Fees—nonjusticiable claims—frivolous and malicious claims—false affidavit

The trial court did not abuse its discretion by awarding attorney fees and costs to defendants where plaintiff swore in an affidavit that his truck was undriveable when it left defendants' shop but admitted at trial that the allegation was not true. The false affidavit was the only reason the case proceeded to trial, and plaintiffs' claims were frivolous and malicious.

Appeal by plaintiffs from judgment entered 1 September 2017 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 9 August 2018.

Smith Law Group, PLLC, by Matthew L. Spencer, for plaintiffs-appellants.

Bennett & Guthrie, P.L.L.C., by Joshua H. Bennett, for defendants-appellees.

BERGER, Judge.

Burton Construction Cleanup & Landscaping, Inc. and Charles Burton (collectively "Plaintiffs") appeal from a directed verdict judgment entered September 1, 2017 in favor of Outlawed Diesel Performance, LLC, William Daniel Brown, and Grant Brown (collectively "Defendants"). Plaintiffs assert that the trial court erred by (1) denying their motion for summary judgment which was filed and heard prior to trial, (2) granting Defendants' motion for directed verdict, and (3) granting Defendants' motion for costs and attorney's fees. We disagree.

Factual and Procedural Background

On April 27, 2016, Plaintiffs filed a complaint in Forsyth County Superior Court against Defendants. The complaint was related to repairs Defendants were to undertake on a vehicle owned by Plaintiffs. Plaintiffs alleged that they were initially provided an estimate of \$5,300.00 for the repairs, but Defendants submitted a bill in the amount of \$8,258.21 for work performed on the vehicle. Defendants refused to release the vehicle until full payment was made by Plaintiffs.

Plaintiffs eventually obtained the vehicle, but had concerns about the quality of work done. Plaintiffs had the vehicle towed to a local dealership for inspection. Plaintiffs claimed that many of the repairs had not been completed.

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Defendants filed a motion for summary judgment on April 21, 2017. Defendants' motion was denied, and the case was tried in Forsyth County Superior Court in May 2017. At trial, Plaintiff Charles Burton admitted that he lied in an affidavit concerning the condition of the vehicle, and Plaintiffs were also unable to provide evidence of damages to support their claims. The trial court entered a directed verdict in favor of Defendants as to all of Plaintiffs' claims for relief. In deciding Defendants' counterclaims, the jury found that Plaintiffs failed to perform as required by the contract, and awarded Defendants the sum of \$5,677.03.

On June 2, 2017, Defendant filed a motion for attorney's fees and costs, accompanied with an affidavit by a Forsyth County attorney attesting to the skill level required to handle this type of civil case and the customary hourly rate for comparable attorneys in Forsyth County. There was also attached to the motion an affidavit from attorney Joshua H. Bennett attesting to the time he dedicated to Defendants' case, his hourly rate, and the total expense incurred by Defendants in legal fees defending Plaintiffs' claims through entry of the directed verdict.

The trial court ordered Plaintiffs to pay costs associated with mediation in the amount of \$495.00, and awarded \$21,692.50 in attorneys' fees. Plaintiffs appeal.

Analysis

[1] Initially, we note that Plaintiffs are not entitled to appellate review of the trial court's denial of their motion for summary judgment. Plaintiffs have failed to include a copy of the order denying summary judgment in the record on appeal, which precludes review by this Court. N.C.R. App. 9(a)(1)(h); *see also Beneficial Mtge. Co. v. Peterson*, 163 N.C. App. 73, 79, 592 S.E.2d 724, 728 (2004) ("The omission from the record on appeal of any order denying summary judgment thus precludes review.").

Even if Plaintiffs' motion for summary judgment was improperly denied, a trial court's ruling

[on] a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts, either judge or jury.

To grant a review of the denial of the summary judgment motion after a final judgment on the merits would mean that a party who prevailed at trial after a complete presentation of evidence by both sides with cross-examination could be deprived of a favorable verdict.

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This would allow a verdict reached after the presentation of all the evidence to be overcome by a limited forecast of the evidence. In order to avoid such an anomalous result, we hold that the denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits.

WRI/Raleigh, L.P. v. Shaikh, 183 N.C. App. 249, 252, 644 S.E.2d 245, 246-47 (2007) (*purgandum*¹). Therefore we cannot consider Plaintiffs' argument concerning the trial court's denial of their motion for summary judgment, and it is dismissed.

[2] Additionally, Plaintiffs have declined to include a transcript of the trial court proceedings in the record.² "The burden is on the appellant to commence settlement of the record on appeal, including providing a verbatim transcript if available." *Li v. Zhou*, ___ N.C. App. ___, ___, 797 S.E.2d 520, 524 (2017) (*purgandum*). Plaintiffs' failure to include the transcript is fatal to their arguments on appeal concerning entry of directed verdict by the trial court.

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)). In addition,

in determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

Turner v. Duke Univ., 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989).

1. Our shortening of the Latin phrase "*Lex purgandum est.*" This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to mean simply that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

2. Counsel for Plaintiffs included as part of the record a copy of a letter he sent counsel for Defendants dated December 20, 2017. The letter states in relevant part, "[w]e have not ordered, nor do we plan to order portions of the transcript to include with the record."

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Without the benefit of a verbatim transcript, this Court is not able to conduct a review of the trial court's directed verdict to determine if the evidence was insufficient as Plaintiffs assert, and we must affirm the trial court. *See* N.C.R. App. P. 9(a) ("In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9.")

[3] Finally, Plaintiffs contend the trial court erred in granting Defendants' motion for attorney's fees and costs pursuant to N.C. Gen. Stat. §§ 6-21.5 and 75-16.1.

In any civil action, . . . the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. The filing of a general denial or the granting of . . . a motion for a directed verdict pursuant to G.S. 1A-1, Rule 50, . . . is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award. A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees. The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this section.

N.C. Gen. Stat. § 6-21.5 (2017).

In determining if an award of costs and attorney's fees is proper under N.C. Gen. Stat. § 6-21.5,

[f]irst, we must determine whether or not the Plaintiffs presented a justiciable issue in their pleadings. Our case law has held that "in reviewing an order granting a motion for attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.5, the presence or absence of justiciable issues in the pleadings is a question of law that this Court reviews *de novo*."

Second, the trial court's decision to award or deny attorney's fees under section 6-21.5 is a matter left to the sound discretion of the trial court. An abuse of discretion occurs when a decision is either manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.

Next, we examine the award of costs and expenses to the prevailing party. Whether a trial court has properly

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interpreted the statutory framework applicable to costs is a question of law. We therefore review the trial court's interpretation *de novo*. However, the reasonableness and necessity of costs is reviewed for abuse of discretion.

McLennan v. Josey, 247 N.C. App. 95, 97-98, 785 S.E.2d 144, 147 (2016) (*purgandum*).

The trial court found that Plaintiffs' claims were not justiciable. We agree.

In order to find complete absence of a justiciable issue it must conclusively appear that such issues are absent even giving the pleadings the indulgent treatment they receive on motions for summary judgment or to dismiss. Under this deferential review of the pleadings, a plaintiff must either: (1) reasonably have been aware, at the time the complaint was filed, that the pleading contained no justiciable issue; or (2) be found to have persisted in litigating the case after the point where he should reasonably have become aware that pleading he filed no longer contained a justiciable issue. Section 6-21.5 was enacted to discourage frivolous legal action and that purpose may not be circumvented by limiting the statute's application to the initial pleadings. Frivolous action in a lawsuit can occur at any stage of the proceeding and whenever it occurs is subject to the legislative ban.

Credigy Receivables, Inc. v. Whittington, 202 N.C. App. 646, 655, 689 S.E.2d 889, 895 (*purgandum*), *review denied*, 364 N.C. 324, 700 S.E.2d (2010).

Here, the trial court found that Plaintiffs had instituted an action against Defendants for failure to make necessary repairs which caused Defendants' vehicle to be undriveable. Plaintiffs subsequently filed a motion for summary judgment which included an affidavit by Plaintiff Charles Burton asserting the truck was undriveable and had sustained \$22,750.00 in damages. The trial court specifically found, "[b]ased on the issues of fact surrounding Plaintiffs' damages, whether the truck was driveable or not, the Court denied Defendants' Motion for Summary Judgment on the issue of Plaintiffs' damages."

Without the benefit of a verbatim transcript, we are only able to review the documents in the record, which include the trial court's

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directed verdict judgment and the order for attorney's fees and costs. A review of the record establishes, at a minimum, that Plaintiffs persisted in litigating the case after the point where they should have reasonably been aware that the pleadings no longer contained a justiciable issue.

The trial court found that at trial, "Plaintiff Charles Burton admitted during cross-examination that he knew the truck was 'driveable' when it left Defendants' shop" and that his statement in the affidavit that the truck was "undriveable" was incorrect. The trial court also found that Plaintiffs' false affidavit was the only reason they were able to proceed to trial, and ultimately found Plaintiffs' claims to be frivolous and malicious. Moreover, the trial court found Plaintiffs were unable to prove their purported damages with any "reasonable certainty."

In awarding attorney's fees and costs, the trial court found

An award of attorney's fees against the Plaintiffs in this case would not amount to sanctioning a party for pursuing a good faith claim simply because they ultimately did not prevail. In this case, the Plaintiffs knew or should have known before they instituted this action that they lacked – and could not obtain – evidence to support the crucial element of their claim that they had been damaged in any way by any act or omission of the Defendants. Plaintiffs provided the sworn affidavit of Plaintiff Burton to defeat summary judgment in which he claimed his truck was 'undriveable' when it left the Defendants' shop. However, under cross-examination at trial, Burton admitted that allegation – which was the basis for Plaintiffs' damages claim – was false.

...

[T]he Plaintiffs' claim was not simply unmeritorious, but also frivolous and malicious under N.C.G.S. §75-16.1.

Defendants have provided evidentiary support indicating that their fees were reasonable, including the Affidavit of their lead counsel Joshua H. Bennet and the affidavit of . . . a leading litigator in Forsyth County and the surrounding area. . . .

The services performed by Bennett & Guthrie, PLLC on behalf of the Defendants in this litigation were highly skilled, reasonable[,] and necessary.

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Bennett & Guthrie, PLLC attorneys, paralegals, and legal assistants worked a total of 116.9 hours and billed \$21,692.50 during the defense of the litigation. The requested fees do not include any amounts that the Defendants incurred after the entry of directed verdict on May 23, 2017, including those fees incurred in the recovery of their attorney's fees and costs. This amount was appropriate, reasonable[,] and necessary.

Based upon the record before us, the trial court did not abuse its discretion by awarding attorney's fees and costs to Defendants.

In an action for unfair and deceptive trade practices,

the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

(1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or

(2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C. Gen. Stat. § 75-16.1 (2017).

Again, based upon the findings of the trial court and the limited record before us, the trial court did not abuse its discretion by awarding attorney's fees to Defendants pursuant to N.C. Gen. Stat. §75-16.1.

Conclusion

The trial court's directed verdict is affirmed. We affirm the award of attorney's fees and costs by the trial court because the Plaintiffs have failed to demonstrate the trial court abused its discretion.

AFFIRMED.

Judges DIETZ and TYSON concur.

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[261 N.C. App. 325 (2018)]

CABARRUS COUNTY BOARD OF EDUCATION, PETITIONER

v.

DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; DALE R. FOLWELL, STATE TREASURER (IN OFFICIAL CAPACITY ONLY); STEVEN C. TOOLE, DIRECTOR, RETIREMENT SYSTEMS DIVISION (IN OFFICIAL CAPACITY ONLY), RESPONDENTS

No. COA17-1017

Filed 18 September 2018

1. Administrative Law—Administrative Procedure Act—adoption of retirement benefits cap factor—applicability—legislative intent

The Board of Trustees of the Teachers' and State Employees' Retirement System was required to adhere to the rule-making provisions of the Administrative Procedures Act (APA) before adopting a cap factor to limit retirement benefits for certain members, pursuant to N.C.G.S. § 135-5(a3), based on the intent of the legislature as evidenced by the plain language of the relevant statutes. Statutory interpretation reveals neither an express nor an implied exemption from the APA in Chapter 135, and the cap factor falls within the APA definition of a "rule." The requirement that the cap factor must be based upon professionally determined assumptions and projections does not implicate an alternative procedure to that found in the APA.

2. Administrative Law—state agency—rule interpretation—deference

In an action to determine whether the adoption of a cap factor limiting the retirement benefits of certain members of the Teachers' and State Employees' Retirement System needed to comply with the rule-making procedures of the Administrative Procedures Act (APA), the Court of Appeals did not need to determine whether the trial court gave proper deference to the agency's interpretation of the authorizing statute because it is the Court's duty to interpret administrative statutes.

Appeal by Respondents from judgment entered 30 May 2017 by Judge James E. Hardin, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 14 May 2018.

Tharrington Smith, LLP, by Deborah R. Stagner; and Michael Crowell, Attorney, by Michael Crowell, for Petitioner-Appellee.

CABARRUS CTY. BD. OF EDUC. v. DEP'T OF STATE TREASURER

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Attorney General Joshua H. Stein, by Solicitor General Matthew W. Sawchak, Deputy General Counsel Blake W. Thomas, Deputy Solicitor General Ryan Y. Park, and Special Deputy Attorney General Joseph A. Newsome, for Respondents-Appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Elizabeth L. Troutman and Jill R. Wilson; and North Carolina School Boards Association, by Legal Counsel Allison Brown Schafer, for North Carolina School Boards Association, amicus curiae.

McGEE, Chief Judge.

I. Procedural History

The Cabarrus County Board of Education (“Petitioner”), filed a “Request for Declaratory Ruling” pursuant to N.C. Gen. Stat. § 150B-4 (2017) and 20 N.C. Admin. Code 01F.0201 *et seq.* on 18 October 2016. Pursuant to this filing, Petitioner requested the Retirement Systems Division (the “Division”) of the Department of State Treasurer (the “Department”) (along with State Treasurer at that time, Janet Cowell,¹ and Steven C. Toole, Director of the Division (“Director Toole”), in their official capacities, (“Respondents”)) to enter a declaratory ruling that the Division’s adoption of a “cap factor” for the Teachers’ and State Employees’ Retirement System (“TSERS”) pursuant to N.C. Gen. Stat. § 135-5(a3) (2017) was “void and of no effect because the [Board of Trustees of TSERS (the ‘Board’)] did not follow the rule making procedures of . . . the Administrative Procedure Act [(the ‘APA’).]”² Director Toole denied Petitioner’s request by letter dated 17 November 2016, and Petitioner filed a “Petition for Judicial Review” of Director Toole’s decision in Superior Court, Cabarrus County, on 16 December 2016. Petitioner moved for summary judgment on 25 April 2017, the matter was heard on 10 May 2017, and the trial court granted summary judgment in favor of Petitioner by judgment entered 30 May 2017. Respondents appeal.

1. By the time of the order granting summary judgment, Dale R. Folwell had become the State Treasurer, and had been substituted as a named Respondent.

2. TSERS is established and controlled by the provisions of Article 1 of Chapter 135 of the General Statutes (“Article 1”) – N.C. Gen. Stat. §§ 135-1 through 135-18.11 (2017). The APA is found in Article 2A of Chapter 150B – N.C. Gen. Stat. §§ 150B-1 through 150B-52 (2017).

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II. Facts

In 2014, the General Assembly enacted new legislation (the “Act”),³ establishing a cap factor for certain employees covered by TSERS (“members”). 2014 N.C. Sess. Laws 88, sec. 1.(a). The purpose of the Act, in relevant part, was to “adopt a contribution-based benefit cap factor” (the “cap factor”), in order to limit retirement benefits paid by TSERS for certain members, whose State salaries had greatly increased in the latter years of their State employment, thereby significantly increasing their retirement benefits in disproportion to their overall contributions to TSERS. *See* N.C.G.S. § 135-5(a3).⁴

Dr. Barry Shepherd (“Dr. Shepherd”) was superintendent of Petitioner for a period of time until his retirement on 1 May 2015. Because of Dr. Shepherd’s employment history with the State, he was eligible for TSERS retirement benefits, but was also subject to having his benefits capped pursuant to the provisions of the Act. Generally, once the Division determines that a member’s benefits will be capped pursuant to the Act, the following actions are required:

If a member’s retirement allowance is subject to an adjustment pursuant to the contribution-based benefit cap established in G.S. 135-5(a3), the [Division] shall notify the member and the member’s employer that the member’s retirement allowance has been capped. The [Division] shall compute and notify the member and the member’s employer of the total additional amount the member would need to contribute in order to make the member not subject to the contribution-based benefit cap. This total additional amount shall be the actuarial equivalent of a single life annuity adjusted for the age of the member at the time of retirement . . . that would have had to have been purchased to increase the member’s benefit to the pre-cap level. Except as otherwise provided in this subsection, the member shall have until 90 days after notification regarding this additional amount or until 90 days after the effective date of retirement, whichever is later, to submit a lump sum payment to the annuity savings fund in order for

3. “AN ACT to enact anti-pension-spiking legislation by establishing a contribution-based benefit cap[.]” 2014 N.C. Sess. Laws 88, preamble and sec. 1.(a).

4. This is a simplified explanation of the Act, but an in-depth explanation is not required for our analysis of the issues on appeal.

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the retirement system to restore the retirement allowance to the uncapped amount.

N.C. Gen. Stat. § 135-4(jj) (2015);⁵ *see also* N.C.G.S. § 135-8(f)(2)(f). Upon Dr. Shepherd's retirement, the Division informed him and Petitioner that, pursuant to the Act, a contribution of \$208,405.81 would be required to restore Dr. Shepherd's benefits to their pre-cap amount. Petitioner submitted this amount to the Division on behalf of Dr. Shepherd, but also initiated this action, as indicated above, to challenge the validity of the cap factor "adopted" by the Board and applied in this case to determine the \$208,405.81 amount.

Because the Division and the Board, as subdivisions of the Department, are subject to the contested case provisions of the APA, Petitioner requested a declaratory ruling from the Division that the cap factor as adopted by the Board was invalid for two reasons: (1) "because the [B]oard did not follow the rule making procedures of [the APA];" and (2) that because the cap factor "is not an actuarial assumption under 20 N.C. Admin. Code 02B.0202[.]"⁶ it was "not exempt from the rule making procedures of the APA[.]" Petitioner further asked for a ruling that the invoice sent by the Division for \$208,405.81 was void since the cap factor used to calculate this amount had not been properly adopted pursuant to APA rule making requirements. As noted above, the Division denied Petitioner's requested rulings and Petitioner petitioned for judicial review, which ultimately resulted in the 30 May 2017 summary judgment in favor of Petitioner that is currently before us on appeal.

We note that there are seven additional appeals by the Department – and certain of its subdivisions and employees – currently before us that involve identical issues and arguments. The resolution of this appeal will also determine the resolution of those seven additional appeals, because

5. We note that the language of N.C.G.S. § 135-4(jj) (2017) references "G.S. 128-27(a3)" instead of "G.S. 135-5(a3)." We are unable to determine why "G.S. 128-27(a3)" is included in the 2017 version of the Statute. N.C.G.S. § 135-4(jj) (2015), the version effective when this matter was heard by the trial court, references "G.S. 135-5(a3)," not "G.S. 128-27(a3)." The Session Laws do not indicate that there existed any intent to amend the statute to replace "G.S. 135-5(a3)" with "G.S. 128-27(a3)". *See* 2015 N.C. Sess. Laws 168, sec. 7.(a), effective 1 January 2016; 2017 N.C. Sess. Laws 128, sec. 2.(a), effective 20 July 2017. The section including "G.S. 128-27(a3)" was amended, or corrected, to again cite "G.S. 135-5(a3)" by 2018 N.C. Sess. Laws 85, sec. 14., effective 25 June 2018. We use the 2015 version of the statute because it was in effect during the time period relevant to this appeal.

6. 20 N.C. Admin. Code 02B.0202 includes rules adopted by the Division, including the procedures for adopting tables, rates, and assumptions recommended by the Division's actuary.

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our holdings in this appeal will apply equally to the seven additional appeals.⁷ Additional relevant facts will be included in our analysis below.

III. Analysis

Respondents argue that the trial court erred in granting summary judgment in favor of Petitioner, because the rule making provisions of the APA do not apply to N.C.G.S. § 135-5(a3) and, therefore, the Board acted within the law and its authority in adopting the cap factor outside of the APA rule making process. We disagree and affirm summary judgment.

Summary judgment is properly granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). “ ‘On appeal, this Court reviews an order granting summary judgment *de novo*.’ ” *Manecke v. Kurtz*, 222 N.C. App. 472, 475, 731 S.E.2d 217, 220 (2012) (citations omitted). Findings of fact and conclusions of law are not required in an order granting summary judgment, and “ ‘[i]f the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered.’ ” *Save Our Schools of Bladen Cty. v. Bladen Cty. Bd. of Educ.*, 140 N.C. App. 233, 237–38, 535 S.E.2d 906, 910 (2000) (citation omitted). This Court is, however, limited to Respondents’ arguments on appeal when considering whether to overturn the trial court’s decision.⁸ *Ahmadi v. Triangle Rent A Car, Inc.*, 203 N.C. App. 360, 363, 691 S.E.2d 101, 103 (2010) (on appeal from grant of summary judgment, pursuant to N.C. R. App. P. 28(b)(6), arguments the appellant failed to make in its brief were considered abandoned and not considered by this Court).

Respondents make two arguments in support of their position that the Board acted properly in the procedure it used to adopt the cap factor and, therefore, summary judgment in favor of Petitioner was granted in error: (1) “The legislature chose to have the cap factor adopted by resolution, not by rule[;]” and (2) “[t]he superior court erred by failing to give weight to the [Division’s] interpretation of its enabling statute.” We address each argument in turn.

7. The seven additional appeals are COA17-1018, COA17-1019, COA17-1020, COA17-1021, COA17-1022, COA17-1023, and COA17-1024.

8. Because in this case Respondents are the appellants.

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A. *The General Assembly's Intent – Application of Rule Making*

[1] The trial court found and concluded that “[t]he cap factor meets the [APA] definition of a rule in that it is a regulation or standard adopted by the Board . . . to implement G.S. 135-5(a3). As such, the cap factor is subject to the rule making requirements of [the APA] unless otherwise exempted.” Although findings of the trial court on summary judgment do not control our *de novo* review, we note that Respondents do not argue on appeal that the cap factor fails to meet the APA definition of a “rule.” Instead, Respondents argue: “The General Assembly has distinguished functions that require rule[]making from functions that do not[,]” and further argue that determination of a cap factor by the Board is a “function” that the General Assembly intended to exempt, by implication, from the rule making provisions of the APA.

1. Express Exemption

As our courts have repeatedly noted:

The purpose of the APA “is to establish as nearly as possible a uniform system of administrative rule making and adjudicatory procedures for State agencies,” and the APA applies “to every agency as defined in G.S. 150B-2(1), except to the extent and in the particulars that any statute, including subsection (d) of this section, makes specific provisions to the contrary.” N.C. Gen. Stat. § 150B-1(b), (c) (1989). . . . As our Supreme Court has held, the “General Assembly intended only those agencies *it expressly and unequivocally exempted from the provisions of the Administrative Procedure Act be excused in any way from the Act’s requirements and, even in those instances, that the exemption apply only to the extent specified by the General Assembly.*” *Vass [v. Bd. of Trustees of State Employees’ Medical Plan]*, 324 N.C. 402, 407, 379 S.E.2d 26, 29 (1989)].

North Buncombe Assn. of Concerned Citizens v. Rhodes, 100 N.C. App. 24, 28, 394 S.E.2d 462, 465 (1990) (emphasis added).

There is no dispute that the Division, as a sub-agency of the Department, is subject to the APA. The “Policy and scope” section of the APA states its purpose: “This Chapter establishes a uniform system of administrative rule making and adjudicatory procedures for agencies. The procedures ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same

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person in the administrative process.” N.C.G.S. § 150B-1(a). Some agencies or sub-agencies are *completely* exempted from the APA by N.C.G.S. § 150B-1(c): “Full Exemptions[,]” “[t]his Chapter applies to every agency except” those specifically exempted by direct reference. N.C.G.S. §§ 150B-1(c)(1) through (7). Neither the Department, nor any of its subdivisions, are granted total exemption from the provisions of the APA. *Id.* N.C.G.S. § 150B-1(d) – “Exemptions from Rule Making” – states: “Article 2A of this Chapter does not apply to the following” enumerated agencies or subdivisions thereof.⁹ N.C.G.S. §§ 150B-1(d)(1) through (28). Neither the Department, nor any of its subdivisions, are exempted from the rule making provisions of the APA pursuant to N.C.G.S. § 150B-1(d). Article 2A includes nothing that indicates any legislative intent to exempt the Board from the rule making process for any purpose. Further, no part of N.C.G.S. § 135-5(a3), or N.C.G.S. § 135-5 as a whole, references the APA – much less includes any express language exempting its provisions from the rule making procedures of Article 2A.

As noted above, N.C.G.S. § 135-5(a3) is found in Article 1, “Retirement System for Teachers and State Employees,” of Chapter 135. N.C.G.S. §§ 135-1 through 135-18.11. Pursuant to Article 1: “A Retirement System is hereby established and placed under the management of the Board . . . for the purpose of providing retirement allowances and other benefits under the provisions of this Chapter for teachers and State employees of the State of North Carolina.” N.C.G.S. § 135-2. “[A]ll contributions from participating employers and participating employees to this Retirement System shall be made to *funds* held in trust” by the Division. N.C.G.S. § 135-2 (emphasis added). N.C.G.S. § 135-6 concerns the “Administration” of the Retirement System. It establishes that the Board is responsible for the “general administration and responsibility for the proper operation of the Retirement System and for making effective the provisions of the Chapter[.]” N.C.G.S. § 135-6(a). Other duties required of the Board include:

Rules and Regulations. – Subject to the limitations of this Chapter, the Board . . . shall, from time to time, *establish rules and regulations* for the administration of the *funds* created by this Chapter and for the transaction of its business. The Board . . . shall also, from time to time, in its discretion, adopt rules and regulations to prevent injustices and inequalities which might otherwise arise in the administration of this Chapter.

9. Article 2A is the section of the APA that governs rule making.

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N.C.G.S. § 135-6(f). There is no dispute that the rule making provisions of the APA apply to the Board when it “establish[es] rules and regulations for the administration of the funds created by” Chapter 135 – including “all contributions from participating employers and participating employees . . . made to funds held in trust” by the Division. *Id.*; N.C.G.S. § 135-2.

The portion of N.C.G.S. § 135-5(a3) relevant to Respondents’ arguments states:

Anti-Pension-Spiking Contribution-Based Benefit Cap. – Notwithstanding any other provision of this section, every service retirement allowance provided under this section for members who retire on or after January 1, 2015, is subject to adjustment pursuant to a contribution-based benefit cap under this subsection. *The Board . . . shall adopt a contribution-based benefit cap factor recommended by the actuary, based upon actual experience, such that no more than three-quarters of one percent (0.75%) of retirement allowances are expected to be capped.* The Board . . . shall modify such factors every five years, as shall be deemed necessary, based upon the five-year experience study as required by G.S. 135-6(n).

N.C.G.S. § 135-5(a3) (emphasis added). All “retirement allowances” are paid from funds held in trust, which are maintained in solvency by contributions from participating employers and employees (or “members”). N.C.G.S. § 135-2. Absent clear contrary direction from the General Assembly, management of the funds from which retirement allowances are disbursed must be accomplished pursuant to rules adopted pursuant to the rule making provisions of the APA. N.C.G.S. § 135-6(f); N.C.G.S. § 150B-1(a); *Rhodes*, 100 N.C. App. at 28, 394 S.E.2d at 465.

The most clear and direct means available to the General Assembly whereby it could have expressed its intent to exclude the Board’s adoption of a cap factor from rule making procedures was to include an express exemption in either the APA, N.C.G.S. § 135-5(a3), or some other relevant statute. The General Assembly did not make this choice, and enacted N.C.G.S. § 135-5(a3) without any associated statutory exemptions from the rule making provisions of the APA with respect to adoption of the cap factor, or for any other of the Board’s duties. This, despite the fact that the General Assembly has done so for specific tasks of other agencies. *See, e.g.*, N.C.G.S. § 150B-1(d)(7) (specifically exempting “The State Health Plan for Teachers and State Employees in administering the provisions of Article 3B of Chapter 135 of the General

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Statutes” from APA rule making requirements); N.C.G.S. § 150B-2(8a)(j.) (“The term [‘rule’] does not include” “[e]stablishment of the interest rate that applies to tax assessments under G.S. 105-241.21.”). According to the reasoning in *Vass* and *Rhodes*, the rule making provisions of the APA should apply whenever the Board adopts a “rule,” because the General Assembly has not expressly exempted the Board from the rule making provisions of the APA. *Rhodes*, 100 N.C. App. at 28, 394 S.E.2d at 465.¹⁰

2. Exemption by Implication

However, as Respondents have noted, this Court, and our Supreme Court, have held that exemption from the APA can be recognized by *implication* rather than express language in certain limited circumstances. See *Bring v. N.C. State Bar*, 348 N.C. 655, 501 S.E.2d 907 (1998); *N.C. State Bar v. Rogers*, 164 N.C. App. 648, 596 S.E.2d 337 (2004) (recognizing, in turn, that by creating express statutory procedures, for rule making and hearing of contested cases, different from those of the APA, the General Assembly intended the North Carolina State Bar (the “State Bar”) to operate outside APA requirements). Respondents have directed this Court to no agency or sub-agency, other than the State Bar, that has been determined to have been exempted from the APA by *implication*, and we have found none.

Nonetheless, Respondents compare the wording used in N.C.G.S. § 135-5(a3) to wording used in other parts of Article 1, contending: “This case turns on a particular feature of statutory language: the use of the word ‘rule’ in some places but not in others.” Respondents’ argument is that the General Assembly’s intent to exclude adoption of the cap factor from APA rule making is evident once we apply the maxim *expressio unius est exclusio alterius*, because the General Assembly used the word “rule” in some parts of Article 1, but not in others, and thereby indicated a clear intent that APA rule making only applies when the actual word “rule” is used. We resort to rules of statutory interpretation only if the meaning of some portion of the relevant statute is legally ambiguous. Assuming, *arguendo*, that the challenged language of N.C.G.S. § 135-5(a3) is ambiguous, Respondents’ argument still fails.

Our Supreme Court has rejected an *expressio unius est exclusio alterius* argument in similar circumstances. *Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 592–93, 447 S.E.2d 768, 782 (1994) (citation and parentheses omitted) (“[The relevant organic] statute

10. We again note that Respondents make no argument on appeal that the cap factor does not fall within the APA definition of a “rule.”

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makes no provision for petitioner to commence a contested case hearing, nor does it expressly deny him that right. Respondents, however, would have us apply to it the maxim *expressio unius est exclusio alterius*, mention of specific circumstances *implies* the exclusion of others, and conclude that the legislature intended, albeit by implication, to exclude persons aggrieved, other than the permit applicant or permittee, from those entitled to a contested case hearing under the [APA.]). The Court in *Empire Power* held that the organic statute, N.C.G.S. § 143–215.108(e), had to be interpreted *together with* the relevant provisions of the APA:

N.C.G.S. § 143–215.108(e) and N.C.G.S. § 150B–23, however, are *in pari materia*, and we must give effect to both if possible. Respondents basically contend that the organic statute amends, repeals, or makes exception to the [APA *by implication*. “The presumption is always against an intention to [amend or] repeal an earlier statute.” We thus should not construe the silence of N.C.G.S. § 143–215.108(e) . . . as a repeal of any . . . rights expressly conferred upon [the petitioner] under the [APA. The legislature has not expressed or otherwise made manifestly clear an intent to deprive petitioner of any right . . . he might have by virtue of the [APA; moreover, there is not such repugnancy between the statutes as to create an implication of amendment or repeal “to which we can consistently give effect under the rules of construction of statutes.”

Id. at 593, 447 S.E.2d at 782 (citations omitted). The Court explained that if there is “a fair and reasonable construction of the organic statute that harmonizes it with the provisions of the [APA, . . . it is our duty to adopt that construction. *Id.* (citation omitted). The Court further reasoned:

“Ordinarily, . . . the enactment of a law will not be held to have changed a statute that the legislature did not have under consideration at the time of enacting such law; and implied amendments cannot arise merely out of supposed legislative intent in no way expressed, however necessary or proper it may seem to be. *An intent to amend a statute will not be imputed to the legislature unless such intention is manifestly clear from the context of the legislation; and an amendment by implication, or a modification of, or exception to, existing law by a later act, can occur only where the*

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terms of a later statute are so repugnant to an earlier statute that they cannot stand together."

The [APA entitles petitioner to an administrative hearing; the organic statute, respondents contend, denies him that right. The question thus is whether the legislature intended, in enacting the air pollution control administrative review provisions, to deprive petitioner of the right it expressly conferred upon him in the [APA. Applying the foregoing rules of statutory construction, we conclude that because the organic statute *did not expressly provide otherwise*, the legislature did not intend to deprive petitioner of his right to an administrative hearing.

Empire Power, 337 N.C. at 591–92, 447 S.E.2d at 781–82 (citations and footnote omitted) (some emphasis added). The Court concluded: "Considering the unequivocal 'language of the statute [the [APA], the spirit of the act, and what the act seeks to accomplish,' we conclude that the legislature intended that the [APA should control unless the organic statute *expressly* provides otherwise." *Id.* at 594–95, 447 S.E.2d at 783 (citations omitted). The Court thus held that, because the organic statute involved in *Empire Power* did not *expressly* amend the APA to withdraw the petitioner's right of appeal pursuant to the APA and, because there was not "*such repugnancy between the statutes as to create an implication of amendment or repeal* 'to which we can consistently give effect under the rules of construction of statutes[,]'" the provisions of the APA controlled. *Id.* at 593, 447 S.E.2d at 782 (citation omitted) (emphasis added); *see also Id.* at 595, 447 S.E.2d at 783–84 (plenary citations in accord).

Respondents cite *Bring* and *Rogers* in support of their argument that the General Assembly expressed a clear intention to remove adoption of the cap factor from APA rule making requirements by omitting the word "rule" from the relevant language of N.C.G.S. § 135-5(a3). *Bring* and *Rogers* do both recognize an "exemption" from provisions of the APA of an agency – the State Bar – by implication rather than specific exemption. *Rogers* involved an appeal from the suspension of an attorney's ("Rogers") license to practice law. *Rogers*, 164 N.C. App. 648, 596 S.E.2d 337. *Rogers* argued in part that "he should have had a hearing before an administrative law judge under the [APA]" instead of being forced to conduct his hearing before the Disciplinary Hearing Commission of the State Bar (the "DHC"). *Id.* at 652–53, 596 S.E.2d at 341. This Court rejected *Rogers*' "contention that he should be entitled

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to a hearing before an administrative law judge under the APA.” *Id.* at 654, 596 S.E.2d at 341. In addressing Rogers’ argument, this Court stated:

The APA is a statute of general applicability, and does not apply where the Legislature has provided for a more specific administrative procedure to govern a state agency. *See Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 586-87, 447 S.E.2d 768, 778-79 (1994). The Legislature has *expressly and specifically* given the State Bar Council and DHC the power to regulate and handle disciplinary proceedings of the State Bar. *See* N.C. Gen. Stat. § 84-28 (2003) (powers of the State Bar Council to discipline attorneys); N.C. Gen. Stat. § 84-28.1 (disciplinary hearing commission powers). As such, defendant is not entitled to application of the APA to his State Bar disciplinary proceeding in this case.

Id. (emphasis added). Although in *Rogers* this Court did not make an explicit holding that the organic statutes involved – N.C. Gen. Stat. § 84-15 *et seq.* (2017) – expressly amended the APA, we determined, by examining the organic statutes themselves, that the clear intent of the General Assembly was to exempt the DHC from APA contested case provisions. *See Id.*; *Empire Power*, 337 N.C. at 593, 447 S.E.2d at 782. The clear implication is that this Court based its determination on reasoning that, by creating an entirely independent procedure and reviewing authority within the State Bar, with authority to identify, investigate, prosecute, and rule upon alleged violations, the “the terms of [the] later [organic] statute [we]re so repugnant to [the APA] that they [could not] stand together”¹¹ and, therefore, the General Assembly intended to exempt DHC disciplinary proceedings from APA contested case procedures:

The Legislature has expressly and specifically given the State Bar Council and DHC the power to regulate and handle disciplinary proceedings of the State Bar. *See* N.C. Gen. Stat. § 84-28 (2003) (powers of the State Bar Council to discipline attorneys); N.C. Gen. Stat. § 84-28.1 (disciplinary hearing commission powers). As such, defendant is not entitled to application of the APA to his State Bar disciplinary proceeding in this case.

Rogers, 164 N.C. App. at 654, 596 S.E.2d at 341.

11. *Id.* at 591, 447 S.E.2d at 781 (citations and quotation marks omitted).

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In essence, this Court recognized that the General Assembly enacted a distinct, thorough, complete, and self-contained disciplinary process by which the State Bar – through the DHC – was mandated to initiate and pursue investigations and hearings as required to police and regulate attorney conduct. This process includes procedural rules – such as a right of direct appeal from any final order of the DHC to this Court. *See* N.C.G.S. § 84-21 (“(a) The Council shall adopt the rules pursuant to G.S. 45A-9.” “(b) . . . Copies of all rules and regulations and of all amendments adopted by the Council shall be certified to the Chief Justice of the Supreme Court of North Carolina . . . : Provided, that the [C]ourt may decline to have so entered upon its minutes any rules, regulations and amendments which in the opinion of the Chief Justice are inconsistent with this Article.”); *see also, e.g.*, N.C.G.S. § 84-23; N.C.G.S. § 84-28; N.C.G.S. § 84-28.1. Therefore, the organic statute left no room for application of APA procedures, and this Court held APA contested case provisions did not apply.

Bring is fully consistent with our analysis of *Empire Power* and *Rogers*. We first note in general: “When a dispute between a state agency and another person arises and cannot be settled informally, the procedures for resolving the dispute are governed by the Administrative Procedure Act (APA), N.C. Gen. Stat. §§ 150B-1 to -63.” *Rhodes*, 100 N.C. App. at 28, 394 S.E.2d at 465 (citation omitted). In *Bring*, our Supreme Court held that the General Assembly clearly intended the State Bar to adopt rules without resort to APA rule making provisions:

It was not necessary to adopt the rule in accordance with the requirements of the APA. *N.C.G.S. § 84-21 gives specific directions as to how the Board shall adopt rules. These directions must govern over the general rule-making provision of the APA.* We note that, in her appeal, the petitioner followed N.C.G.S. § 84-24 dealing with appeals of decisions of the Board of Law Examiners and not the provisions of the APA.

The Board’s rules, including Rule .0702, were submitted to this Court as required by N.C.G.S. § 84-21 and published at volume 326, page 810 of the North Carolina Reports. This complies with the statutory requirement. Rule .0702 was properly adopted.

Bring, 348 N.C. at 660, 501 S.E.2d at 910 (citation omitted) (emphasis added). The organic statute at issue in *Bring*, N.C. Gen. Stat. § 84-21 (2017), established a rule making procedure completely independent

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from that contained in the APA. Therefore, the General Assembly's intent was clear that the specific rule making provisions enacted for proceedings governed by the State Bar controlled, not those contained in the APA. The Court held "there are adequate procedural safeguards in the statute to assure adherence to the legislative standards" and noted that "N.C.G.S. § 84-24 and N.C.G.S. § 84-21 require that the Bar Council and this Court must approve rules made by the Board." *Id.* at 659, 501 S.E.2d at 910. The Court further held that there was "a sufficient standard to guide the Board" in rule making pursuant to Article 4, Chapter 84. *Id.*

Article 1 includes nothing approaching the level of independent rule making mandated by the General Assembly for the State Bar in Article 4, Chapter 84. We note that Respondents have utilized the procedures of the APA throughout this action without objection, including obtaining appeal to this Court pursuant to the right of appeal granted by the APA. N.C.G.S. § 150B-52.

Additionally, when read together, *Rogers* and *Bring* effectively hold that the APA simply does not apply to Article 4, Chapter 84. N.C.G.S. § 150B-1(a) (emphasis added) ("**Purpose.** – This Chapter [the APA] establishes a uniform system of administrative *rule making* and *adjudicatory procedures* for agencies."); *Bring*, 348 N.C. at 660, 501 S.E.2d at 910 (APA rule making provisions do not apply to the State Bar); *Rogers*, 164 N.C. App. at 654, 596 S.E.2d at 341 (APA adjudicatory procedures do not apply to the State Bar). In contrast, Article 1 expressly recognizes the general application of the APA. *See, e.g.*, N.C.G.S. § 135-8(d)(3a) ("Notwithstanding Chapter 150B of the General Statutes [the APA], the total amount payable in each year to the pension accumulation fund shall not be less than . . ."). Respondents make an argument very different than the analyses behind the holdings in *Bring* and *Rogers*, which served to exempt the *entire* State Bar from the requirements of the APA. Respondents contend that the application of APA rule making should be determined *on a line-by-line basis*, based upon the *implied intent* of the General Assembly, as determined by analyzing each individual sentence or clause of a statutory provision. Respondents cite to no authority in support of this argument, neither *Bring* nor *Rogers* support Respondents' argument, and the other opinions cited by Respondents do not involve the APA and are, therefore, easily distinguishable.

Respondents also focus on the requirement that the cap factor adopted by the Board is one "recommended by the actuary." N.C.G.S. § 135-5(a3). However, the inclusion of a specific requirement concerning the *source* of the proposed cap factor in no manner serves to remove the entire cap factor adoption process from general APA requirements. As

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part of its administration of Retirement System funds, the Board “shall keep in convenient form such data as shall be necessary for actuarial valuation of the various funds of the Retirement System, and for checking the experience of the System.” N.C.G.S. § 135-6(h). The Board is required to “designate an actuary who shall be the technical adviser of the Board . . . on matters regarding the operation of the funds created by the provisions of this Chapter[.]” N.C.G.S. § 135-6(l). Respondents contend that N.C.G.S. § 135-6(l) establishes “a specific procedure for how the [Board] adopts actuarial recommendations” from the designated actuary. N.C.G.S. § 135-6(l) states in relevant part:

For purposes of the annual valuation of System assets, the experience studies, and all other actuarial calculations required by this Chapter, all the assumptions used by the System’s actuary, including mortality tables, interest rates, annuity factors, and employer contribution rates, shall be set out in the actuary’s periodic reports or other materials provided to the Board[.] These materials, once accepted by the Board, shall be considered part of the Plan documentation governing this Retirement System; similarly, the Board’s minutes relative to all actuarial assumptions used by the System shall also be considered part of the Plan documentation governing this Retirement System, with the result of precluding any employer discretion in the determination of benefits payable hereunder[.]

N.C.G.S. § 135-6(l). Respondents contend that the above “statutory procedures vary significantly from the requirements of the APA[, s]ee [N.C.G.S.] §§ 150B-21.1 to 21.7,” because of the requirement that the Board adopt a cap factor from cap factor recommendations provided by its actuary.

Sections 150B-21.1 to 21.7 of the APA constitute the “Adoption of Rules” section of the APA. Non-exempted agencies must comply with the provisions of N.C.G.S. § 150B-19.1, *see* N.C.G.S. § 150B-21.2(a), which include in relevant part:

(a) In developing and drafting rules for adoption in accordance with this Article, agencies shall adhere to the following principles:

....

(5) When appropriate, *rules shall be based on sound, reasonably available scientific, technical,*

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economic, and other relevant information. Agencies shall include a reference to this information in the notice of text required by G.S. 150B-21.2(c).

N.C.G.S. § 150B-19.1 (emphasis added); N.C.G.S. § 150B-21.2(a) (“[b]efore an agency adopts a permanent rule, the agency must comply with the requirements of G.S. 150B-19.1”); N.C.G.S. § 150B-21.2(c)(2a) (the “notice of the proposed text of a rule must include” a “link to the agency’s Web site containing the information required by G.S. 150B-19.1(c)”); N.C.G.S. § 150B-19.1(c)(5) (the posting required by N.C.G.S. § 150B-21.2(c)(2a) shall include “[a]ny fiscal note that has been prepared for the proposed rule”); N.C.G.S. § 150B-19.1(e) (before submitting “a proposed rule for publication in accordance with G.S. 150B-21.2, the agency shall review the details of any fiscal note prepared in connection with the proposed rule and approve the fiscal note before submission”); N.C.G.S. § 150B-19.1(f) (emphasis added) (“[i]f the agency determines that a proposed rule will have a substantial economic impact as defined in G.S. 150B-21.4(b1), the agency *shall consider at least two alternatives* to the proposed rule”); N.C.G.S. § 150B-21.4(b1) (when an agency proposes adoption of a rule “that would have a substantial economic impact and that is not identical to a federal regulation that the agency is required to adopt, the agency shall prepare a fiscal note for the proposed rule change and have the note approved by the Office of State Budget and Management[.]” “the term ‘substantial economic impact’ means an aggregate financial impact on all persons affected of at least one million dollars (\$1,000,000) in a 12-month period”). The APA regularly requires supporting documentation based on factual data that is prepared by an actuary – including prior to the adoption of certain rules. As a further example:

Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would require the expenditure or distribution of *funds* subject to the State Budget Act, Chapter 143C of the General Statutes,^[12] it must submit the text of the proposed rule change, an analysis of the proposed rule change, and a fiscal note on the proposed rule change to the Office of State Budget and Management and obtain certification from the

12. N.C. Gen. Stat. § 143C-1-1(b) (2017) (“The provisions of this Chapter shall apply to every State agency, unless specifically exempted herein[.]”); N.C. Gen. Stat. § 143C-1-3(a)(10) (2017) (Definition: “**Pension and Other Employee Benefit Trust Funds.** – Accounts for resources that are required to be held in trust for the members and beneficiaries of defined benefit pension plans, defined contribution plans, other postemployment benefit plans, or other employee benefit plans.”).

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Office of State Budget and Management that the funds that would be required by the proposed rule change are available. The fiscal note must state the amount of funds that would be expended or distributed as a result of the proposed rule change *and explain how the amount was computed*. The Office of State Budget and Management must certify a proposed rule change if funds are available to cover the expenditure or distribution required by the proposed rule change.

N.C.G.S. § 150B-21.4(a) (emphasis added).

Contrary to Respondents' arguments, what N.C.G.S. § 135-6(l) requires is that "the assumptions used by the [Division's] actuary [to determine cap factor recommendations], including mortality tables, interest rates, annuity factors, and employer contribution rates," "shall be set out in the actuary's periodic reports or other materials provided to the Board[.]" The requirement that the actuary submit proposed cap factors to the Board for adoption does not constitute a separate procedure for rule making purposes. This requirement merely insures that the cap factor adopted by the Board is based upon professionally determined assumptions and projections, and that there will be sufficient documentation to satisfy the requirements of Chapter 135, the APA,¹³ and the State Budget Act – N.C. Gen. Stat. §§ 143C-1-1 *et seq.* (2017).

Further, we presume the General Assembly enacted Article 1 with full knowledge of the relevant provisions in the APA, and intended for those provisions to apply to Article 1 absent express legislation to the contrary – which they declined to enact. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 189, 594 S.E.2d 1, 20 (2004) (citations omitted) (we presume " 'the legislature acted in accordance with reason and common sense,' and 'with full knowledge of prior and existing law' "). We hold that there is nothing to support a finding that " 'the terms of [N.C.G.S. § 135-8(3a)] are so repugnant to' " the rule making requirements of the APA such that the General Assembly intended to remove adoption of the cap factor from APA rule making requirements by implication. *Empire Power*, 337 N.C. at 591, 447 S.E.2d at 781 (citations omitted) (emphasis removed).

3. Statutory Language

In further support of our decision, we look to the language of the relevant statutes when considered *in pari materia*. Because the Division

13. See, e.g., N.C.G.S. § 135-6(l) to (n), concerning the purposes and duties of actuaries.

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is subject to the APA and the procedures of the APA apply to Petitioner's "action," the definitions found in N.C.G.S. § 150B-2 apply to N.C.G.S. § 135-5(a3) unless specifically supplanted by definitions included in Article 1. *See Izydore v. City of Durham*, 228 N.C. App. 397, 399–401, 746 S.E.2d 324, 325–26 (2013).

The definitions section of Article 1, N.C.G.S. § 135-1, does not define the word "adopt." However, the word "adopt" is defined in the APA: "'Adopt' means to take final action to create, amend, or repeal a rule." N.C.G.S. § 150B-2(1b) (emphasis added). We hold that the word "adopt" in N.C.G.S. § 135-5(a3) has the same meaning as that set forth in N.C.G.S. § 150B-2(1b). Further, Article 1 contains no definition for the word "rule." The APA defines "rule" as follows:

"Rule" means *any* agency regulation, standard, or statement of general applicability that *implements* or interprets *an enactment of the General Assembly* . . . or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee *and the amendment or repeal of a prior rule*.

N.C.G.S. § 150B-2(8a) (emphasis added). The General Assembly has included certain specific exceptions for regulations or standards that would otherwise fall under the definition of rule, for example, the "[e]stablishment of the interest rate that applies to tax assessments under G.S. 105-241.21" is expressly excluded from the APA definition of "rule." N.C.G.S. § 150B-2(8a)(j.). The APA includes no exemption for the N.C.G.S. § 135-5(a3) "cap factor." "'Policy' means any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule." N.C.G.S. § 150B-2(7a). The cap factor is clearly not a "policy" as defined by the APA, as it is binding and non-interpretive. We agree with the trial court and hold that the cap factor falls within the APA definition of a "rule."

Further, pursuant to the APA definition of "adopt," any time the word "adopt" is used, it expressly and necessarily *requires an associated rule*. N.C.G.S. § 150B-2(1b) (emphasis added) ("'Adopt' means to take final action to create, amend, or repeal a rule."). Pursuant to the APA definition of adopt, the *only* thing that the Board in N.C.G.S. § 135-5(a3) could have possibly "adopted" was a "rule." N.C.G.S. § 150B-2(1b). Therefore, treating the cap factor as a "rule," the contested portion of N.C.G.S. § 135-5(a3) can be understood as stating:

The Board . . . shall adopt a [*rule*, namely a] contribution-based benefit cap factor recommended by the actuary,

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based upon actual experience, such that no more than three-quarters of one percent (0.75%) of retirement allowances are expected to be capped. The Board . . . shall modify such [rules] every five years, as shall be deemed necessary, based upon the five-year experience study as required by G.S. 135-6(n).

The language of N.C.G.S. § 135-5(a3), considered *in pari materia* with the APA, does not support a finding that the General Assembly, by enacting N.C.G.S. § 135-5(a3), intended to modify or amend the APA by implication.

B. *Deference to the Board's Interpretation of N.C.G.S. § 135-5(a3)*

[2] Respondents further argue that the trial court “erred by failing to give weight to the [Division’s] interpretation of its enabling statute.” We disagree.

Initially, our review on summary judgment is *de novo*, and we will uphold a grant of summary judgment upon any legitimate basis. *Manecke*, 222 N.C. App. at 475, 731 S.E.2d at 220; *Save Our Schools*, 140 N.C. App. at 237–38, 535 S.E.2d at 910. Therefore, even assuming, *arguendo*, the trial court failed to give proper deference to the Division’s interpretations of Article 1 and the Division’s rule making powers, this fact would be irrelevant to our *de novo* review. *Id.*

Concerning Respondents’ arguments, we first note that, despite the deference we may give an agency’s interpretation of statutes that agency is required to implement and enforce, “it is ultimately the duty of courts to construe administrative statutes; courts cannot defer that responsibility to the agency charged with administering those statutes.” *Wells v. Consolidated Jud’l Ret. Sys. of N.C.*, 354 N.C. 313, 319, 553 S.E.2d 877, 881 (2001) (citing *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 306 S.E.2d 435 (1983)). Respondents argue: “Since 1981, the [Division] has held that the [Board] will adopt actuarial ‘tables, rates, or assumptions’ by resolution. 20 N.C. Admin. Code 2B.0202 (2016).” Respondents contend that the cap factor is an actuarial “rate” or “assumption,” and is therefore governed by 20 N.C. Admin. Code 2B.0202, a rule adopted by the Division pursuant to the authority granted it by Article 1.¹⁴ First, we disagree with Respondents’ argument that the cap factor is itself an actuarial assumption or rate that is

14. The question of whether the provisions of 20 N.C. Admin. Code 2B.0202 conform with the requirements of Article 1 is not before us, and we do not consider that question here.

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governed by provisions of 20 N.C. Admin. Code 2B.0202. The cap factor must be *based upon* valid actuarial assumptions and rates in order for it to comply with the requirements of N.C.G.S. § 135-5(a3), but the cap factor itself is not an actuarial assumption or rate. We have held above that the cap factor is a rule that, *inter alia*, helps determine limits on the retirement benefits of affected State employees. Because the cap factor is a rule for the purposes of APA rule making, and the Board must comply with APA rule making provisions when adopting the cap factor, the Division is without the authority to enact rules, regulations, guidelines, or any other directives that would remove adoption of the cap factor from the requirements of APA rule making.

It is not at all clear that the Board understood the cap factor to be an actuarial assumption or rate, or that it adopted the cap factor pursuant to the provisions of 20 N.C. Admin. Code 2B.0202. Therefore, this Court cannot state with any conviction that the Board, or the Division, interpreted N.C.G.S. § 135-5(a3) in the manner Respondents suggest – *i.e.* in a manner allowing the Board to adopt the cap factor pursuant to the rules set forth in 20 N.C. Admin. Code 2B.0202. Even assuming, *arguendo*, the Division has interpreted N.C.G.S. § 135-5(a3) as argued by Respondents, we hold that such an interpretation is erroneous and contrary to the law. It is this Court, not the Division, that must ultimately decide the issue now that it is before us, and we have done so.

C. Policy Arguments

Respondents' contention that "public comments will not improve the actuary's recommendation," even if correct, does not factor into our analysis. Assuming, *arguendo*, Respondents are correct that application of the rule making procedures of the APA to the adoption of a cap factor is unnecessarily inefficient, and will serve no beneficial purpose, this Court is not the proper entity to address those arguments. Appellate courts will not imply amendments to a statute based " 'merely out of supposed legislative intent in no way expressed, *however necessary or proper it may seem to be.*' " *Empire Power*, 337 N.C. at 591, 447 S.E.2d at 781 (emphasis added) (quoting *In re Assessment of Sales Tax*, 259 N.C. 589, 594, 131 S.E.2d 441, 445 (1963)). "Weighing . . . public policy considerations is the province of our General Assembly, not this Court [.]” *Wynn v. United Health Servs./Two Rivers Health-Trent Campus*, 214 N.C. App. 69, 79, 716 S.E.2d 373, 382 (2011) (citations and quotation marks omitted); *see also Empire Power*, 337 N.C. at 595–96, 447 S.E.2d at 784.

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IV. Conclusion

We hold that APA rule making provisions apply to the Board's adoption of a cap factor. The Division erred in invoicing Dr. Shepherd or Petitioner for any additional contributions pursuant to N.C.G.S. § 135-5(a3) because the cap factor adopted by the Board, and applied in determining the amount of the additional contribution Petitioner was required to pay “in order to make [Dr. Shepherd] not subject to the contribution-based benefit cap[,]” N.C.G.S. § 135-4(jj), was not properly adopted. “An agency shall not seek to implement or enforce against any person a policy, guideline, or other interpretive statement that meets the definition of a rule contained in G.S. 150B-2(8a) if [it] has not been adopted as a rule in accordance with this Article.” N.C.G.S. § 150B-18. We affirm the trial court's grant of summary judgment in favor of Petitioner.¹⁵

AFFIRMED.

Judges BRYANT and STROUD concur.

BRIANA WASHINGTON GLOVER, AND HUSBAND, RANDIE JANSON GLOVER,
INDIVIDUALLY, PLAINTIFFS

V.

THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, A NORTH CAROLINA HOSPITAL
AUTHORITY, D/B/A AND GLEN ELLIS POWELL, II, MD, INDIVIDUALLY, DEFENDANTS

No. COA17-1398

Filed 18 September 2018

1. Statutes of Limitation and Repose—medical malpractice—continuing course of treatment doctrine—misinterpretation of genetic testing results—last act giving rise to claim

A medical malpractice action for negligence in misinterpreting a patient's cystic fibrosis (CF) genetic testing results was not barred by the four-year statute of repose in N.C.G.S. § 1-15(c) where defendant OB/GYN doctor's last act giving rise to the claim was not the initial misinterpretation of the CF test results but rather a later

15. We reiterate that the reasoning, holdings, and directives in this opinion apply with equal weight to the seven related appeals in COA17-1018, COA17-1019, COA17-1020, COA17-1021, COA17-1022, COA17-1023, and COA17-1024.

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preconception appointment before plaintiffs' child with CF was conceived. The continuing course of treatment doctrine applied because the doctor had a continuing professional duty to care for plaintiffs, based on their ongoing family planning and health needs, and he continued the wrongful treatment over time without correction after his initial misinterpretation of the CF test results.

2. Medical Malpractice—wrongful conception—child with cystic fibrosis—dismissal of complaint

Where plaintiffs filed a medical malpractice action for a doctor's negligence in misinterpreting plaintiff mother's cystic fibrosis (CF) genetic testing results, which led to the conception and birth of a child with CF, plaintiffs' complaint stated a claim upon which relief may be granted for medical malpractice, negligent infliction of emotional distress, and economic damages.

Appeal by Plaintiffs from order entered 19 September 2017 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 August 2018.

Brown, Moore, & Associates, by R. Kent Brown, Jon R. Moore, and Paige L. Pahlke, for plaintiffs-appellants.

Parker, Poe, Adams, & Bernstein LLP., by John H. Beyer and Katherine H. Graham, for defendants-appellees.

Glenn, Mills, Fisher & Mahoney, P.A., by Daniel N. Mullins and William S. Mills, for amicus curiae North Carolina Advocates for Justice.

North Carolina Medical Society, by Associate General Counsel William Conor Brockett, for amicus curiae North Carolina Medical Society.

Roberts & Stevens, P.A., for Phillip T. Jackson, for amicus curiae North Carolina Association of Defense Attorneys.

HUNTER, JR., Robert N., Judge.

I. Factual and Procedural Background

On 6 January 2017, Plaintiffs-Appellants Brianna Glover ("Ms. Glover") and Randie Glover ("Mr. Glover") sought and received an Order

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pursuant to N.C. R. Civ. P. 9(j) extending the statute of limitations in a medical malpractice matter to 5 May 2017. The trial court extended the statute of limitations to 5 May 2017. Plaintiffs filed their summons and complaint on 3 May 2017.

Plaintiffs' medical malpractice complaint alleged the following events. Plaintiffs are married and have two children, "M.G." and "J.G." Ms. Glover became a patient of both Greater Carolinas Women's Center and Glen Ellis Powell, II, M.D. ("Dr. Powell") on or before 6 January 2011. After becoming pregnant with Plaintiffs' first child, M.G., Ms. Glover met with Dr. Powell on 13 January 2011 "for a physical exam and to discuss pregnancy related issues including testing for genetic abnormalities and/or mutations." On 9 February 2011, Ms. Glover underwent routine, voluntary testing for cystic fibrosis ("CF"). Prior to doing so, she signed a consent form from Defendants stating, in pertinent part:

CF is a debilitating respiratory and digestive disease that requires lifelong medical care and often shortens [the] lifespan of affected individuals. CF is a genetic disorder Couples in whom both partners are carriers have a 1 in 4 chance of having a child with CF . . . If screening reveals that you are a carrier for CF, then your partner **must** be tested. If he is also a carrier, then your baby has a 25% chance of developing CF. You **will be** referred for genetic counseling and offered amniocentesis or chorionic villus sampling to test the baby for CF[.]

On 11 February 2011, the test results revealed Ms. Glover was a carrier of the cystic fibrosis mutation. The test results further "recommended that carrier testing by mutation analysis and genetic counseling be offered to the carrier (i.e. Briana Glover), relatives and reproductive partners (i.e. Randie Glover) along with appropriate genetic counseling[.]" On or after 11 February 2011, Dr. Powell "failed to review and/or incorrectly interpreted the above referenced positive testing for CF and incorrectly entered into Briana Glover's medical Patient Chart/Antepartum record that the above testing was negative." Contemporaneously with Dr. Powell's incorrect entry into Ms. Glover's chart, the electronic medical record utilized by Dr. Powell and Greater Carolinas Women's Center allowed for repopulation of the same information into Ms. Glover's chart until after the birth of their second child in December 2015.

On or about 10 March 2011, Dr. Powell "advised both Plaintiffs the CF testing was negative[.]" Plaintiffs thereafter relied upon this information in making decisions about future childbearing and conception issues.

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On 14 March 2011, Plaintiffs' first child, M.G., was born "a healthy baby girl without CF." Ms. Glover continued postpartum care with Defendants at Greater Carolinas Women's Center, including an appointment with another physician, Dr. Pressley, on 24 August 2011. On 15 September 2011, Dr. Powell provided Ms. Glover with family planning and "advice of contraceptive management." On 5 February 2013, Ms. Glover saw Dr. Powell at Greater Carolinas Women's Center for OB/GYN care. Ms. Glover continued her OB/GYN care with Defendants on 17 March 2014, when she again saw Dr. Powell for medical care and received advice on family planning and birth control. Ms. Glover again saw Dr. Powell on 19 March 2015 for "OB/GYN care, advice and counseling which included discussions of the health of her child and husband" Ms. Glover further discussed with Dr. Powell additional health issues related to birth control measures.

On 6 April 2015, Ms. Glover went to Greater Carolinas Women's Center OB/GYN, again seeing Dr. Pressley, because she believed she was pregnant, and she sought advice regarding a dental treatment and the welfare of her baby she believed she was carrying. Plaintiff was in fact pregnant, and she continued her care with Defendants. On 21 May 2015, Defendants ran tests to determine the existence of genetic abnormalities of Plaintiffs' baby. All such tests were negative. Defendants did not test to determine if Ms. Glover was a cystic fibrosis carrier, "due to the incorrectly reported and recorded CF testing from her 2011 pregnancy."

Plaintiffs' second child, J.G., was born on 5 December 2015. The delivery was "uncomplicated," and delivery records noted "no fetal conditions abnormalities." On 9 December 2015, routine screening tested their newborn to rule out cystic fibrosis. On 11 December 2015, results from that test returned as "abnormal newborn screen." Defendant Carolinas Medical Center and Novant Health Pediatrics performed follow up testing, which further suggested cystic fibrosis; however, on 7 January 2016, Ms. Glover "refuted such results" based on Dr. Powell's ongoing representation such tests were negative. On 13 January 2016, Plaintiffs were again advised that cystic fibrosis was a high probability, which Ms. Glover again refuted based on Defendants' previous tests and a lack of family history. On 28 January 2016, Plaintiffs were advised of J.G.'s diagnosis of cystic fibrosis. J.G. was subsequently referred to specialists due to several indications of cystic fibrosis. On 18 January 2016, test results ordered by Dr. Black revealed abnormalities indicating cystic fibrosis. On 28 January 2016, Dr. Black confirmed to Plaintiffs J.G.'s cystic fibrosis diagnosis. J.G.'s chart "was documented with a diagnosis of CF" on 6 February 2016.

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Plaintiffs continued care with Defendants. On 22 June 2016, Plaintiffs had an appointment with Dr. Powell, where he “honorably acknowledged his error.” He documented in the chart he had not correctly informed Plaintiffs regarding the cystic fibrosis test.

Plaintiffs’ complaint alleged “[a]t all times relevant . . . Plaintiff Brianna Glover was under the continuous care of Defendants for issues relating to family planning including but not limited to relevant and applicable genetic testing.” Further, “[a]t all times relevant . . . Defendants knew or should have known that both Plaintiffs relied on the continuous care of Defendants to provide accurate advice and counsel for issues relating to family planning including but not limited to relevant and applicable genetic testing.” Defendants had a “duty to provide appropriate, accurate and reasonable care and counseling regarding reproductive issues and the risks attendant with the same.” Plaintiffs asserted proper testing and information would have provided the opportunity to make informed decisions about childbearing. Defendants knew or should have known Plaintiffs could “suffer severe emotional distress should they have a child with CF,” “bear unanticipated and dramatically increased costs of child rearing due to medical needs and expenses of a child with CF.”

Plaintiffs’ complaint also asserted Defendants’ negligence was the “direct and proximate” cause of Plaintiffs’ damages, including “hardships,” “extraordinary expenses,” “stress,” “severe emotion[al] distress,” “loss of wages,” and “other ‘injuries and damages as may accrue, all of which were reasonably foreseeable by Defendants.’” Plaintiffs sought damages for “extraordinary past and prospective care, treatment and hospitalization(s)” for J.G., compensation for “pain, and suffering from the severe emotional distress” suffered, expenses related to the care and emotional distress, lost wages, and pregnancy expenses.

On 30 June 2017, pursuant to N.C. Gen Stat. §1A-1, Rule 12(b)(6), Defendants collectively filed a motion to dismiss Plaintiffs’ complaint for failure to state a claim upon which relief can be granted. In their motion, Defendants stated Plaintiffs’ claim for wrongful birth and damages related to “ ‘the extraordinary expenses for their son’s care’ ” are not recognized by North Carolina law. Defendants further asserted Plaintiffs’ complaint was “barred by the applicable four (4) year statute of repose set forth in N.C. G. S. § 1-15(c).”

On 6 July 2017, the trial court filed notice of the hearing for Defendants’ motion to dismiss. On 28 July 2017, the trial court filed an amended notice of the hearing.

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On 5 September 2017, the trial court heard Defendants' motion to dismiss. Defendants first addressed the court asserting the statute of repose barred Plaintiffs' claims, since Plaintiffs filed the lawsuit "more than six years after the negligent act" of which they complained. Defendants noted Dr. Powell treated Ms. Glover during her first pregnancy under the "belief that she has this negative test for cystic fibrosis." Subsequently, Ms. Glover received "no intervening care for 18 months" after the birth of her first child, M.G. While Ms. Glover consulted with Dr. Powell for gynecological care in a "nonpregnant state," her pregnancy care in April 2015 was "more than four years from when Dr. Powell initially interpreted this cystic fibrosis test." Defendants noted Plaintiffs filed the complaint "more than six years beyond the negligent act at issue." Additionally, Defendants asserted Plaintiffs relied on a "continued course of treatment" theory in order to extend the statute of limitations. Because of the "18-month gap between delivery of the first child[,] then following up for routine gynecological care," Defendants argued "this is about a continuous course of treatment[,] rather than "continuing the [doctor/patient] relationship." Defendants argued "we have one negligent act[,] [a]nd it's interpreting one test during one pregnancy." Further, there was "an entirely separate, distinct, second pregnancy[,] with treatment provided to Plaintiffs "unrelated to the [first] pregnancy, unrelated to the genetic testing[.]" Defendants argued accordingly, the complaint was filed outside the statute of repose and should be dismissed.

Plaintiffs next addressed the trial court. Plaintiffs stated Ms. Glover's first appointment with Dr. Powell on 13 January 2011, while Ms. Glover was pregnant, included cystic fibrosis testing. The purpose of the test, according to Plaintiffs, was not only to look at this child, "but to look -- prospective to look at any children she and her husband may have." Plaintiffs asserted, "doctors would certainly not have given [Ms. Glover] advice on contraception and family planning . . . if they had thought she had a positive cystic fibrosis test." Ms. Glover received advice and consultation about birth control in 2014. In March of 2015, Ms. Glover came in again for counseling for birth control. Defendants "stopped [Ms. Glover's] birth control pills." At the time, Ms. Glover was "barely pregnant" or "7 to 10 days pregnant." In December 2015, Ms. Glover gave birth to her second child, J.G, who was born with cystic fibrosis. Plaintiffs argued the statute of limitations had not run, and they "have a valid cause of action for the negligent infliction of emotional distress occasioned by these events."

After hearing arguments from both sides, in its 13 September 2017 order the trial court dismissed Plaintiffs' complaint with prejudice

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because the complaint failed to state a claim upon which relief may be granted based on: (1) the running of the statute of repose; (2) any claim for wrongful birth, to the extent Plaintiffs alleged such a claim; and (3) any claim for wrongful conception, to the extent Plaintiffs asserted such a claim, as to damages for extraordinary costs associated with rearing a child with cystic fibrosis.

Plaintiffs filed written notice of appeal on 29 September 2017.

II. Jurisdiction

This Court has jurisdiction over a final order of the trial court. N.C. Gen. Stat. § 7A-27(b)(1) (2017). The trial court's order as to the statute of repose was final; accordingly, we have jurisdiction over the court's ruling as to that issue. *See id.* The trial court's order as to Plaintiffs' claims for wrongful birth and wrongful conception were partial, and thus not final. *See id.* Because we reverse on the issue of the statute of repose, we do not have jurisdiction on the two subsidiary issues as to availability or extent of damages.

III. Standard of Review

This Court reviews a 12(b)(6) motion to dismiss considering “whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory[.]” *Harris v. NCB Nat. Bank of North Carolina*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). “A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant notice of the nature and basis of [a plaintiff's] claim so as to enable [them] to answer and prepare for trial.” *McAllister v. Ha*, 347 N.C. 638, 641, 496 S.E.2d 577, 580 (1998) (citation omitted). Further, “when the allegations in the complaint give sufficient notice of the wrong complained of, an incorrect choice of legal theory should not result in dismissal of the claim if the allegations are sufficient to state a claim under some legal theory.” *Id.* at 641, 496 S.E.2d at 580 (citation omitted). “On appeal of a [Rule] 12(b)(6) motion to dismiss, this Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.” *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663-64 (2013) (citation omitted). We decide a question presented on a Rule 12(b)(6) motion to dismiss on the basis of factual allegations in the complaint, taking them as true.

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Hargett v. Holland, 337 N.C. 651, 653, 447 S.E.2d 784, 786 (1994) (citing *Jackson v. Bumgardner*, 318 N.C. 172, 174-75, 347 S.E.2d 743, 745 (1986)).

Whether a statute of repose has run is a question of law. *Glens of Ironduff Prop. Owners Ass'n v. Daly*, 224 N.C. App. 217, 220, 735 S.E.2d 445, 447 (2012) (citation omitted). It is well settled “[q]uestions of statutory interpretation are ultimately questions of law for the courts and are reviewed de novo.” *In re Summons of Ernst & Young*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citation omitted).

IV. Analysis

[1] On appeal, Plaintiffs assign error to the trial court for (1) dismissing their complaint based upon the improper application of the statute of repose, and (2) dismissing their damages claim in a wrongful conception action for extraordinary expenses of raising a child with cystic fibrosis.

This appeal presents the question of whether a claim for professional malpractice against a doctor for alleged negligence in interpreting and/or communicating test results is barred by the four-year statute of repose contained in our professional malpractice statute of limitations, N.C. Gen. Stat. § 1-15(c) (2017), when the claim is filed more than six years after the doctor interpreted and/or communicated the results. Section 1-15(c) provides:

Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. *Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action:* Provided further, that where damages are sought

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by reason of a foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in the body, a person seeking damages for malpractice may commence an action therefor within one year after discovery thereof as hereinabove provided, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action.

Id. (emphasis added). Medical malpractice is, in pertinent part, a “civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.” N.C. Gen. Stat. § 90-21.11 (2)(a) (2017).

A defense under a statute of limitations or statute of repose may be raised via a motion to dismiss if it appears on the face of the complaint that such a statute bars the claim. *Hargett*, 337 N.C. at 653, 447 S.E.2d at 786 (citations omitted). “Unlike statutes of limitations, which run from the time a cause of action accrues, ‘statutes of repose . . . create time limitations which are not measured from the date of injury. These time limitations often run from defendant’s last act giving rise to the claim or from substantial completion of some service rendered by defendant.’ ” *Id.* at 654, 447 S.E.2d at 787 (quoting *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 234 n.3, 328 S.E.2d 274, 276-77 n.3 (1985)). Further, “[a] statute of repose creates an additional element of the claim itself which must be satisfied in order for the claim to be maintained.” *Id.* at 654, 447 S.E.2d at 787 (citation omitted). Differing from a limitation provision that makes a claim unenforceable, section 1-15 (c) establishes, therefore, a time period in which a claim based on professional malpractice

must be brought in order for that cause of action to be recognized . . . [and] if the action is not brought within the specified period, the plaintiff literally has *no* cause of action . . . [t]he harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress.

Id. at 655, 447 S.E.2d at 787 (emphasis original) (internal quotations and citations omitted).

Our Supreme Court has provided guidance for calculating the statute of repose, explaining it begins

when a specific event occurs, regardless of whether a cause of action has accrued or whether an injury has

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resulted Thus, the repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue, which is generally recognized as the point in time when the elements necessary for a legal wrong coalesce.

Id. at 655, 447 S.E.2d at 788 (quoting *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 474-75 (1985)). Moreover, “[r]egardless of when plaintiffs’ claim might have accrued, or when plaintiffs might have discovered their injury, because of the four-year statute of repose, their claim is not maintainable unless it was brought within four years of the last act of defendant giving rise to the claim.” *Id.* at 655, 447 S.E.2d at 788 (citations omitted).

Using this guidance, the *Hargett* Court held defendant, an attorney who contracted to prepare a will after which defendant was an attesting witness to the will, had a duty to prepare and supervise the execution of the will. *Id.* at 655, 447 S.E.2d at 788. Such arrangement did not, however, “impose on defendant a continuing duty thereafter to review or correct the prepared will, or to draft another will.” *Id.* If an ongoing relationship between the attorney and client had been alleged to exist between the testator and defendant, or if factual allegations led to such an inference, then the complaint might have been sufficient to survive the motion to dismiss. *Id.*

Key to the Court’s reasoning was the concept of “continuing professional duty.” *See id.* at 656, 447 S.E.2d at 788. Such a concept arises in medical malpractice claims in which a continuous course of treatment occurs of the patient by the physician. While “an attorney’s duty to a client is . . . determined by the nature of the services he agreed to perform[,]” likewise, “a physician’s duty to the patient is determined by the particular medical undertaking for which he was engaged[.]” *Id.* at 656, 447 S.E.2d at 788.

Under this theory, malpractice is viewed as a continuing tort based on the physician’s actions in continuing and repeating the wrongful treatment without correction. *Ballenger v. Crowell*, 38 N.C. App. 50, 58, 247 S.E.2d 287, 293 (1978) (citations omitted). Thus, “the ‘continuing course of treatment’ doctrine has been accepted as an exception to the rule that ‘the action accrues at the time of the defendant’s negligence.’” *Stallings v. Gunter*, 99 N.C. App. 710, 714, 394 S.E.2d 212, 215, *rev. denied* 327 N.C. 638, 399 S.E.2d 125 (1990) (quoting *Ballenger v. Crowell*, 38 N.C. App. at 58, 247 S.E.2d at 293). The *Stallings* Court announced:

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Because the “continuing course of treatment” doctrine affects determination of the accrual date, and the accrual date under § 1-15(c) is the starting date for the running of the statute of limitation and statute of repose, it is correct to use the “continuing course of treatment” doctrine to determine the start date for running of the statute of repose. It is only by using the doctrine that a court can determine defendant’s relevant “last act.”

Id. at 715, 394 S.E.2d at 216. The Court further ruled “the action accrues at the conclusion of the physician’s treatment of the patient, so long as the patient has remained under the continuous treatment of the physician for the injuries which gave rise to the cause of action.” *Id.* at 714, 394 S.E.2d at 215 (citation omitted). Moreover:

To take advantage of the ‘continuing course of treatment’ doctrine, plaintiff must show the existence of a *continuing* relationship with his physician, and . . . that he received *subsequent* treatment from that physician. Mere continuity of the general physician-patient relationship is insufficient to permit one to take advantage of the continuing course of treatment doctrine. Subsequent treatment must consist of either an affirmative act or an omission [which] must be related to the original act, omission, or failure which gave rise to the cause of action. However, plaintiff is not entitled to the benefits of the ‘continuing course of treatment’ doctrine if during the course of the treatment plaintiff knew or should have known of his or her injuries.

Id. at 715, 394 S.E.2d at 216 (internal quotations and citations omitted, alterations in original).

On multiple occasions, our appellate courts have considered whether the “continuing course of treatment” doctrine applied in a particular case. *See e.g., Horton*, 344 N.C. at 139, 472 S.E.2d at 782 (applying continuing course of treatment doctrine to plaintiff’s claim for negligent insertion of a catheter to find action barred when brought more than three years after defendant’s last act giving rise to action); *Stallings*, 99 N.C. App. at 716, 394 S.E.2d at 216 (finding patient did not have the benefit of the continuing course of treatment doctrine since more than four years had passed from date general dentist informed patient of dental problems). Under the doctrine, a plaintiff need not show the treatment rendered subsequent to the negligent act was also negligent, so long as the physician continued to treat the patient for the particular disease or

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condition created by the original act of negligence. *See Horton*, 344 N.C. at 139, 472 S.E.2d at 782. Additionally, a plaintiff must allege the physician could have taken further action to remedy the damage caused by the original negligence. *See Webb v. Hardy*, 182 N.C. App. 324, 328, 641 S.E.2d 754, 757 (*rev. denied* 361 N.C. 704, 653 S.E.2d 879) (2007).

Here, Plaintiffs argue the trial court's factual finding that "the continuing course of treatment doctrine is inapplicable" is "completely contrary to the allegations" in their complaint. The time frame for filing their wrongful conception, negligent infliction of emotional distress, and economic damages claims was "tolled under the 'continuing course of treatment' doctrine," and Plaintiffs then timely filed their claims.

Dr. Powell does not deny having misread or misinterpreted the test results for cystic fibrosis; rather, Defendants assert Plaintiffs' medical malpractice action is statutorily barred and not excepted by the "continuing course of treatment" doctrine. Defendants argue Dr. Powell's treatment "was not continuous and did not relate back to the original negligent act" of the cystic fibrosis carrier test.

On *de novo* review, we must assess whether Plaintiffs' claims exist under some legal theory, *see Ha*, 347 N.C. at 641, 496 S.E.2d at 580, taking factual allegations as true, *see Hargett*, 337 N.C. at 653, 447 S.E.2d at 786. In order to assess whether the statute of repose bars Plaintiffs' claims, we must determine "the time of the occurrence of the last act of the defendant giving rise to the cause of action[.]" *See* N.C. Gen. Stat. § 1-15(c). To do so, we consider the particular medical undertaking for which Defendants' services were engaged. *See Hargett*, 337 N.C. at 656, 447 S.E.2d at 788.

From 6 January 2011, when Ms. Glover first became a patient of Defendants, and 13 January 2011, when she first met with Dr. Powell, to 22 June 2016, when Plaintiffs learned Dr. Powell had incorrectly informed Plaintiffs Ms. Glover was not a carrier of cystic fibrosis, Ms. Glover sought and received OB/GYN care, advice, and counseling. During that time, her care included, for example, information on family planning, child health, and birth control. Far beyond a general physician-patient relationship—one that might focus on health issues such as height, weight, or blood pressure screenings—Plaintiffs relied on family planning advice throughout the ongoing relationship. Dr. Powell affirmatively offered family planning advice, and Defendants' further omission—not correcting their error as to the cystic fibrosis test—was crucial to the family planning advice. *See Stallings*, 99 N.C. App. at 715, 394 S.E.2d at 216. Unlike the relationship described in *Hargett*, in which

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an attorney had no continuing duty to plaintiffs once a will was drafted, Defendants here had a continuing duty to care for Plaintiffs, based on the ongoing family planning and health needs undergirding the relationship. *See Hargett*, 337 N.C. at 656, 447 S.E.2d at 788. Defendants continued and repeated the wrongful treatment without correction. *See Ballenger*, 38 N.C. App. at 58, 247 S.E.2d at 293. Further action taken to correct the test results could have remedied the danger caused by the original act. *See Webb*, 182 N.C. App at 328, 641 S.E.2d at 757.

Moreover, Plaintiffs did not know, nor should they have known, of the malpractice that had occurred—that of incorrect information regarding Ms. Glover being a cystic fibrosis carrier—until the birth of their son, J.G. It would be senseless to expect Plaintiffs would presciently know of the misinformation, before a problem arose, and would leave no recourse for Plaintiffs. As they moved forward with family planning decisions, such unknown abnormalities could have arisen many years later. No matter the number of years, the information would have been new to Plaintiffs. For the above reasons, we find the “continuing course of treatment” doctrine squarely applies.

Because the “continuing course of treatment” doctrine is an exception to the rule that the action accrues at the time of the defendant’s negligence, *see Stallings*, 99 N.C. App. at 714, 394 S.E.2d at 215, our calculation of time limitations for Plaintiffs to bring their claims does not begin at the time of injury—when Dr. Powell incorrectly communicated to Ms. Glover regarding the cystic fibrosis carrier test results. Rather, the claim accrues from Defendants’ last act giving rise to the claim—the treatment of Ms. Glover and advice to Plaintiffs for family planning. *See Hargett*, 337 N.C. at 655, 447 S.E.2d at 788; *see also Stallings*, 99 N.C. App. at 715, 394 S.E.2d at 216. Dr. Powell’s original act of negligence misinterpreting the cystic fibrosis test results occurred on 11 February 2011. Plaintiffs concede if Ms. Glover was already pregnant during the 19 March 2015 appointment, during which she received “OB/GYN care, advice and counseling which included discussions of the health of her child and husband . . . [.]” then the last preconception appointment after which she could have made family planning decisions was on 17 March 2014.

We conclude Defendant’s last act giving rise to the claim occurred on 17 March 2014, Ms. Glover’s last preconception appointment. The 17 March 2014 appointment was within the three year statute of limitations, after obtaining the 120-day filing extension, and not more than four years after Plaintiffs received continuing care and advice regarding

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family planning. Accordingly, Plaintiffs' claim is not barred by the four-year statute of repose set forth in N.C. Gen. Stat. § 1-15(c).

[2] We further conclude, taking the factual allegations as true, the complaint states a claim upon which relief may be granted. Plaintiffs alleged in their complaint medical malpractice, negligent infliction of emotional distress, and economic damages. Because the trial court dismissed Plaintiffs' complaint in error, we reverse and remand for further proceedings consistent with this decision.

REVERSED AND REMANDED.

Judges ELMORE and ZACHARY concur.

JORIS HAARHUIS, ADMINISTRATOR OF THE ESTATE OF
JULIE HAARHUIS, (DECEASED), PLAINTIFF

v.

EMILY CHEEK, DEFENDANT

No. COA17-1179

Filed 18 September 2018

1. Receivership—standing—non-parties to underlying action

The trial court erred in a receivership hearing by considering the arguments of third parties (an auto insurer and its attorney) against whom the judgment debtor (defendant) had unliquidated legal claims. The third parties were not parties to the action between plaintiff and defendant, and they had no standing to object to the appointment of a receiver.

2. Receivership—unliquidated legal claims against third parties—judgment debtor's refusal to pursue

In a case arising from the death of a pedestrian whom defendant hit and killed while driving impaired, the trial court erred by denying plaintiff estate administrator's Motion for Appointment of Receiver over defendant's unliquidated legal claims against third parties. Equity required appointment of a receiver where the third parties (defendant's auto insurer and its attorney) allowed a \$50,000 settlement offer from plaintiff to expire, which led to defendant being encumbered with a \$4.3 million judgment; defendant had no ability to satisfy the judgment; and defendant refused to pursue legal claims against the insurer and attorney for their actions.

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Judge DIETZ concurring in separate opinion.

Appeal by plaintiff from order entered 25 July 2017 by Judge Elaine M. O’Neal in Chatham County Superior Court. Heard in the Court of Appeals 22 March 2018.

Copeley Johnson & Groninger, PLLC, by Leto Copeley and Drew H. Culler, for plaintiff-appellant.

Burton, Sue & Anderson, LLP, by Walter K. Burton and Stephanie W. Anderson, and Ivey, McClellan, Gatton & Siegmund, L.L.P., by Charles Ivey, IV, for defendant-appellee.

McAngus, Goudelock & Courie, PLLC, by John P. Barringer and Jeffrey B. Kuykendal, for Universal Insurance Company.

Poyner Spruill LLP, by Cynthia L. Van Horne, for Burton, Sue & Anderson, LLP.

ZACHARY, Judge.

Plaintiff Joris Haarhuis, as administrator of the estate of Julie Haarhuis, appeals from the trial court’s order denying his Motion for Appointment of Receiver over defendant’s unliquidated legal claims against third-parties. We reverse.

Background

Defendant Emily Cheek was driving while impaired in July 2013 when she hit and killed pedestrian Julie Haarhuis. Ms. Haarhuis’s husband, Joris Haarhuis, qualified as administrator of his wife’s estate.

At the time of the crash, Universal Insurance Company insured defendant’s vehicle. Universal determined that the value of plaintiff’s claim exceeded the limits of defendant’s \$50,000 policy. On 2 September 2014, pursuant to Universal’s offer, plaintiff agreed to release its claims against defendant in exchange for payment of the \$50,000 policy limit, on the condition that payment be made within ten days. Universal received plaintiff’s acceptance that same day. Two days later, Universal retained an attorney from Burton, Sue & Anderson, LLP (“Burton”) to represent defendant to the extent of the policy limits. Universal forwarded plaintiff’s settlement demand to the attorney. However, by the time plaintiff’s settlement offer expired on 12 September 2014, plaintiff had not received

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a response from Universal or Burton. Plaintiff filed suit the next week, on 19 September 2014.

As the litigation proceeded, plaintiff again offered to settle, this time in exchange for a \$2 million consent judgment, but plaintiff required Universal's approval. One week later, the attorney representing defendant on her exposure in excess of the policy limits wrote to Universal on defendant's behalf and demanded that it agree to settle the claims against her. This settlement would have permitted defendant to seek relief in bankruptcy. However, roughly one month later, plaintiff was informed that Universal would not approve the \$2 million consent judgment. Plaintiff posits that Universal preferred that defendant not seek relief in bankruptcy, for fear that the bankruptcy trustee would pursue litigation on defendant's behalf against Universal for its failure to settle the case initially for \$50,000. The case then went to trial, and on 28 April 2017 the jury entered a verdict against defendant for \$4.25 million in compensatory damages and \$45,000 in punitive damages. However, the Chatham County Sheriff's Office returned the writ of execution unsatisfied, as the deputy "did not locate property on which to levy" and "[d]efendant refused to pay."

One year later, with the judgment still unsatisfied, plaintiff filed a Motion for Appointment of Receiver pursuant to N.C. Gen. Stat. § 1-363. Plaintiff maintained that defendant possessed property in the form of unliquidated legal claims against Universal and Burton for their actions in causing defendant to be encumbered with a judgment of nearly \$4.3 million. Specifically, plaintiff is of the position that defendant has legal claims against Universal, "including claims for breach of contract, breach of the duty of good faith and fair dealing, unfair trade practice, and tortious bad faith[.]" and against Burton for "breach of fiduciary duty and failure to meet the standard of care[.]"

According to plaintiff,

[t]he potential choses in action described above must be sued upon promptly or the applicable statute of limitations may bar an action. Defendant is wasting valuable time by her failure to take prompt legal action to recover money for the choses in action. Defendant, by her delay in pursuing the choses in action, is in the process of causing irreparable harm to Plaintiff, as Defendant has no other apparent means of satisfying the judgment against her.

Plaintiff therefore sought to have a receiver appointed of defendant's choses in action against Universal and Burton.

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The trial court heard plaintiff's Motion for Appointment of Receiver on 5 June 2017. Plaintiff's and defendant's counsel appeared at the hearing; however, counsel for Universal and Burton appeared as well. Plaintiff objected to the appearances of Universal and Burton for lack of standing as potential debtors of defendant, but the trial court nevertheless permitted Universal and Burton to argue against the appointment of a receiver. Following the hearing, the trial court entered an order containing the following findings and conclusions:

19. Defendant does not wish to have a receiver appointed for any purpose.

...

1. N.C. Gen. Stat. § 1-502 specifies when a receiver may be appointed. The circumstances of this case do not apply as the appointment of a receiver in this case would not "carry the judgment into effect," it would not "dispose of the property according to the judgment," it would not "preserve [the property] during the pendency of an appeal" and this is not a case in which the "judgment debtor refuses to apply his property in satisfaction of the judgment." *See* N.C. Gen. Stat. § 1-502(2) & (3).

2. The appointment of a receiver is within the discretion of the Court. *See Barnes v. Kochar*, 178 N.C. App. 489, 500, 633 S.E.2d 474, 481 (2006).

3. The appointment of a receiver is an equitable remedy. *See Jones v. Jones*, 187 N.C. 589, 592, 122 S.E. 370, 371 (1924) ("[t]he appointment of a receiver is equitable in its nature and based on the idea that there is no adequate remedy at law, and is intended to prevent injury to the thing in controversy").

4. The court finds that the defendant has asserted that she has no property that, to a reasonable degree, could be subject to execution.

The trial court thereafter denied plaintiff's Motion for Appointment of Receiver. Plaintiff timely appealed.

Discussion

On appeal, plaintiff presents the following questions to this Court: (1) "Where a judgment creditor shows the court that a judgment debtor

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has unliquidated legal claims that she refuses to pursue, may the trial court refuse to appoint a receiver?" and (2) "Did the trial court properly allow non-party debtors of Defendant-Appellee judgment debtor to oppose appointment of a receiver?" We first consider plaintiff's argument concerning standing.

A. Standing

[1] Plaintiff argues that the trial court erred when it heard and considered the arguments of Universal and Burton at the receivership hearing because "debtors of a judgment debtor have no standing to object to the appointment of a receiver in aid of execution[.]" We agree.

It is well settled that the debtor of a judgment-debtor lacks standing to object to the appointment of a receiver, as the debtor is not the "party aggrieved" in the underlying action. *Lone Star Industries, Inc. v. Ready Mixed Concrete of Wilmington, Inc.*, 68 N.C. App. 308, 309, 314 S.E.2d 302, 303 (1984). In *Lone Star Industries, Inc.*, the trial court appointed a receiver over certain property of the judgment debtor-corporation at the behest of the judgment-creditor. *Id.* at 308-09, 314 S.E.2d at 302-03. The judgment-creditor claimed that the judgment-debtor possessed unliquidated legal claims against one of its shareholders and one of its former shareholders. *Id.* at 309, 314 S.E.2d at 303. Upon appointment of a receiver over that property, the shareholders appealed. *Id.* With regard to whether the shareholder-appellants had standing to contest the receivership, this Court stated:

That [the shareholder-debtors] are opposed to the defendant debtor receiving the benefit of that property is understandable; but that they were able to assert their opposition in this case for so long under the circumstances is not. The [shareholder-debtors] have no standing in this Court and should have had none in the court below. They are not parties to the case, and, even if they were, their interests are entirely antagonistic to the debtor corporation, whose own interests clearly require that any sums that are owed it by others be promptly applied to its debts.

Id.

The same is true in the instant case. Universal and Burton were not, and are not, parties to the action between plaintiff and defendant, and their interests are "entirely antagonistic" to those of defendant, being that they are her potential debtors. Nor would Universal or Burton be

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legally aggrieved in the instant case by the appointment of a receiver. Accordingly, because Universal and Burton do not have standing to challenge the appointment of a receiver in the instant case, they were not properly before the trial court, and they are not properly before this Court. We do not consider their arguments, and the trial court erred in doing so.

B. Receivership

[2] Next, plaintiff argues that the trial court erred when it denied plaintiff's Motion for Appointment of Receiver. According to plaintiff, the particular circumstances at issue in the instant case entitled plaintiff to have a receiver appointed in order for the receiver to investigate prosecution of defendant's unliquidated legal claims against Universal and Burton so that those funds can be applied in satisfaction of the underlying judgment. Defendant, however, argues that North Carolina law "does not *mandate* appointment of a receiver[.]" and that the trial court did not abuse its discretion when it declined to do so in the instant case. (emphasis added). Specifically, defendant maintains that plaintiff's motion was properly denied first, because the causes of action that plaintiff wants placed in receivership are unassignable under North Carolina law, and second, because those claims are merely "potential or speculative." For the reasons explained below, we find plaintiff's arguments persuasive.

I.

Civil judgments for money damages are typically enforced through the process of execution. N.C. Gen. Stat. § 1-302 (2017). Execution is accomplished through the levying of the judgment-debtor's property, *i.e.*, its physical seizing and subsequent sale. Therefore, property that may be reached by execution typically includes only tangible property or property otherwise represented by instrument. *See* N.C. Gen. Stat. § 1-315(a) (2017). Instances may arise, however, in which a judgment-debtor has no such tangible property that can be reached by execution; therefore, the outstanding judgment remains unsatisfied. In such a case, Chapter 1, Article 31 of the General Statutes allows for the following supplemental proceeding:

The court or judge having jurisdiction over the appointment of receivers may also by order in like manner, and with like authority, appoint a receiver . . . of the property of the judgment debtor, whether subject or not to be sold under execution, except the homestead and personal property exemptions.

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N.C. Gen. Stat. § 1-363 (2017).¹ “[A]fter execution against a judgment debtor is returned unsatisfied[,]” receivership is allowed as a last-resort attempt “to aid creditors to reach the property of every kind subject to the payment of debts which cannot be reached by the ordinary process of execution.” *Massey v. Cates*, 2 N.C. App. 162, 164, 162 S.E.2d 589, 591 (1968). Such a proceeding is “equitable in nature.” *Id.* “[I]t is elementary that a Court of Equity has the inherent power to appoint a receiver, notwithstanding specific statutory authorization.” *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 576, 273 S.E.2d 247, 256 (1981) (citing *Skinner v. Maxwell*, 66 N.C. 45, 48 (1872)).

Section 1-363 exempts only two classes of property from the scope of receivership: “the homestead and personal property exemptions” provided in N.C. Gen. Stat. § 1C-1601(a). Otherwise, Section 1-363 contemplates that a receiver may be appointed in order to facilitate prosecution of an unliquidated legal claim that a judgment-debtor might have against a third party. *See e.g.*, N.C. Gen. Stat. § 1-366 (2017); N.C. Gen. Stat. § 1-360 (2017); *Carson v. Oates*, 64 N.C. 115 (1870). For instance, N.C. Gen. Stat. § 1-366, “Receiver to sue debtors of judgment debtor,” explicitly addresses the situation in which a judgment-debtor’s property takes the form of a contested debt. That section provides:

If it appears that a person . . . alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt is recoverable only in an action against such person . . . by the receiver[.]

N.C. Gen. Stat. § 1-366 (2017). Additionally, in analyzing the reach of Section 1-363, our Supreme Court has stated that “[i]t is an important part of the duties of the receiver to take possession and get control of the property of the judgment debtor, whether in possession or action, as soon as practicable, and to bring all actions necessary to secure and recover such property as may be in the hands of third parties, however they may hold and claim the same[.]” *Coates Bros.*, 92 N.C. at 380. In other words, as defendant concedes, both statute and case law “enable[] a receiver to sue those who owe the judgment debtor.”

1. N.C. Gen. Stat. § 1-502 likewise addresses “the powers of the courts to appoint receivers generally[.]” *Coates Bros. v. Wilkes*, 92 N.C. 377, 383 (1885). Section 1-502(3) provides that a receiver may also be appointed “after judgment” when, *inter alia*, “an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.” N.C. Gen. Stat. § 1-502(3) (2017). The trial court primarily relied on this section in its order denying plaintiff’s Motion for Appointment of Receiver.

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The authority of a receiver to pursue a judgment-debtor's legal claims is not limited solely to those claims that are otherwise assignable. It is important to note that receivership is distinct from assignment. "The assignment of a claim gives the assignee control of the claim and promotes champerty[.]" and is therefore void as against public policy. *Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co.*, 340 N.C. 88, 91, 455 S.E.2d 655, 657 (1995) (citing *Southern Railway Co. v. O'Boyle Tank Lines, Inc.*, 70 N.C. App. 1, 318 S.E.2d 872 (1984)). On the other hand, a "receiver" is "[a] disinterested person appointed by a court . . . for the protection or collection of property that is the subject of diverse claims[.]" *Receiver*, BLACK'S LAW DICTIONARY, 1296 (8th ed. 2014). Specifically, a "judgment receiver" "collects or diverts funds from a judgment debtor to the creditor. A judgment receiver is usu[ally] appointed when it is difficult to enforce a judgment in any other manner." *Judgment Receiver*, BLACK'S LAW DICTIONARY, 1296 (8th ed. 2014). Thus, in the case of receivership, the judgment-creditor exercises no control over the judgment-debtor's legal claims. Rather, the *receiver* does so independently of the judgment-creditor and under the supervision and control of the court. *Lambeth v. Lambeth*, 249 N.C. 315, 321, 106 S.E.2d 491, 495 (1959) (citations omitted) ("The receiver is an officer of the court and is amenable to its instruction in the performance of his duties; and the custody of the receiver is the custody of the law."). The purpose of a receiver of legal claims is in essence to act as a trustee, and a claim being placed in receivership is, at most, analogous to an assignment of the *proceeds* of the claim, which are assignable. *Charlotte-Mecklenburg Hosp. Auth.*, 340 N.C. at 91, 455 S.E.2d at 657 ("The assignment of the proceeds of a claim does not give the assignee control of the case and there is no reason it should not be valid.").

Moreover, "many exceptions to the principles of champerty . . . have been recognized and . . . it has come to be generally accepted that an agreement will not be held to be within the condemnation of the principle[] unless the interference is clearly officious and for the purpose of stirring up strife and continuing litigation." *Wright v. Commercial Union Ins. Co.*, 63 N.C. App. 465, 469, 305 S.E.2d 190, 192-93 (1983) (citation and quotation marks omitted). Such concerns are clearly not at issue where a cause of action is in receivership for the purpose of satisfying an outstanding judgment. Nor is it true that the injured judgment-debtor would have no stake in the outcome of her claims against her own debtor by virtue of those claims being placed in receivership. Instead, the judgment-debtor's interests will "clearly require that any sums that are owed it by others be promptly applied to its debts." *Lone Star Indus., Inc.* 68 N.C. App. at 309, 314 S.E.2d at 303. The judgment-debtor would also have

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an interest in any recovery that exceeds the amount of debt she owes to the judgment-creditor. Thus, if a receiver elects to pursue a cause of action held by a judgment-debtor and the judgment-debtor prevails thereon, the debtor receives the full benefit of the award. That a portion of that award would in turn be applied to satisfy a pending outstanding judgment simultaneously owed by the judgment-debtor is beyond the purview of the public policy concerns that prohibit claim assignment. *See, e.g.,* Anthony J. Sebok, *The Inauthentic Claim*, 64 Vand. L. Rev. 61, 131 (2011) (“The victim’s right to assign her right to redress does not destroy the defendant’s duty to make repair to her, even if the remedy does not go to her, any more than the fact that a victim may no longer be alive, and may be represented by an estate in a survivorship action alters the defendant’s duty in corrective justice to repair the wrongful loss he caused.”).

Likewise, defendant also notes that “compensation for personal injury” is exempt from enforcement of certain claims by creditors pursuant to N.C. Gen. Stat. § 1C-1601(a)(8) (2017). As discussed *supra*, however, the General Assembly included only two Section 1C-1601(a) exemptions into Section 1-363: “the homestead and personal property exemptions.” N.C. Gen. Stat. § 1-363. The Section 1C-1601(a)(8) compensation for personal injury exemption is explicitly excluded from the Section 1-363 supplemental proceeding, and the General Assembly likewise made clear that property may be placed in receivership thereunder “*whether subject or not to be sold under execution[.]*” *Id.* (emphasis added). This language is clear and unambiguous, and we are “not at liberty to divine a different meaning through other methods of judicial construction.” *State v. Hooper*, 358 N.C. 122, 126, 591 S.E.2d 514, 516-17 (2004) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)). Our General Assembly has therefore sanctioned—via supplemental receivership proceedings—the application of personal injury proceeds toward the satisfaction of a judgment-creditor’s outstanding judgment. Such a prerogative is immune from our tampering. *Fagundes v. Ammons Dev. Grp., Inc.*, ___ N.C. App. ___, ___, 796 S.E.2d 529, 533 (2017).

The limits on the scope of property that may be placed within the control of receivership in the event that execution is returned unsatisfied are found within the receivership statutes themselves. Quite plainly, no law in North Carolina provides that a receiver may only transfer a judgment-debtor’s recovery so long as the underlying claim would have been assignable, and so long as the underlying claim is not a personal injury claim. In fact, the law in this State is precisely to the contrary. The

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supplemental receivership proceeding operates to allow an otherwise helpless judgment-creditor to reach the judgment-debtor's property that cannot "be successfully reached by the ordinary process of execution[.]" *Coates Bros.*, 92 N.C. at 379.

In determining whether a judgment-creditor is entitled to have a receiver of this form appointed, the trial court need not be convinced that the defendant will prevail on her legal claim. "To warrant the appointment of a receiver, it need not appear, certainly or conclusively, that the defendant has property that he ought to apply to the judgment[.]" *Id.* at 384. Rather, equity authorizes the appointment of a receiver so long as the party seeking the same "establishes an *apparent* right to property[.]" *Neighbors v. Evans*, 210 N.C. 550, 554, 187 S.E. 796, 797 (1936) (emphasis added). "[I]f there is evidence tending in a reasonable degree to show that [the judgment-debtor] probably has such property, this is sufficient[.]" *Coates Bros.*, 92 N.C. at 384. Once an apparent right to property is shown, it becomes the task of the *receiver*, rather than the trial court, to determine whether any given "apparent right to property" is indeed worth pursuing:

The judgment debtor cannot complain at the appointment of a receiver. If [she] has property subject to the payment of [her] debt, it ought to be applied to it; if [she] has not such property, this fact ought to appear, with reasonable certainty, to the satisfaction of the creditor. The receiver proceeds to do this, not at the peril of the debtor, but at his own peril, as to costs, if he fails in his action. The purpose of the law in such proceedings is to afford the largest and most thorough means of scrutiny, legal and equitable in their character, in reaching such property as the debtor has, that ought justly go to the discharge of the debt his creditor has against him.

It thus appears that supplementary proceedings are incident to the action, equitable in their nature, and that . . . a receiver may be appointed as occasion may require.

Id. at 381.

II.

That appointing a receiver of defendant's unliquidated causes of action against Universal and Burton was a potential remedy available to plaintiff as a judgment-creditor did not, as defendant puts it, mandate that plaintiff had an "absolute right to the appointment of a receiver"

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in the instant case. Indeed, a trial court's decision whether to appoint a receiver is ordinarily reviewed under an abuse of discretion standard. *Williams v. Liggett*, 113 N.C. App. 812, 815, 440 S.E.2d 331, 333 (1994) (citing *Murphy v. Murphy*, 261 N.C. 95, 101, 134 S.E.2d 148, 153 (1964)). Nonetheless, courts are vested with the power to appoint a receiver "[b]y statute and under general equitable principles[.]" *Murphy*, 261 N.C. at 101, 134 S.E.2d at 153 (citation omitted). That equitable nature renders the abuse of discretion standard somewhat nuanced in receivership matters. For example, where a trial court appoints a receiver contrary to its statutory power to do so, it is said that the trial court has abused its discretion. *E.g.*, *Williams*, 113 N.C. App. at 815-17, 440 S.E.2d at 333-34. But where a receivership is otherwise permitted by law, whether one ought to be appointed must be adjudged according to the equities of the particular case at hand. *E.g.*, *Coates Bros.*, 92 N.C. at 385; *see also Lowder*, 301 N.C. at 576-77, 273 S.E.2d at 256; *Murphy*, 261 N.C. at 101, 134 S.E.2d at 153-154; *Hurwitz v. Carolina Sand & Gravel Co.*, 189 N.C. 1, 6-7, 126 S.E. 171, 173-74 (1925); *Oldham v. First Nat'l Bank*, 84 N.C. 304, 308 (1881). That equitable determination does not "rest[] solely in the discretion of the [trial court]," but is instead fully "reviewable by this Court upon appeal." *Coates Bros.*, 92 N.C. at 386, 387 (citations omitted).

For instance, while the compensation for personal injury exemption and the prohibition against claim assignment do not serve as a direct bar to the types of property over which a receiver may be appointed, that is not to say that the public policies underlying those rules would be wholly immaterial to the determination of whether it is *equitable* to appoint a receiver over a legal claim in any given case. Indeed, the purpose of receivership "is to afford the largest and most thorough means of scrutiny, legal and equitable in their character, in reaching such property as the debtor has, that ought *justly* to go to the discharge of the debt his creditor has against him." *Massey*, 2 N.C. App. at 166, 162 S.E.2d at 592 (quoting *Coates Bros.*, 92 N.C. at 381) (emphasis added). The hypothetical policy concerns posed by our concurring colleague would—if such cases were to arise—be appropriately considered in the examination of the particular equities at issue. *E.g.*, *Hurwitz*, 189 N.C. at 6, 126 S.E. at 173 ("The courts of equity are gradually adjusting themselves to modern conditions and look to what in good conscience is for the best interest of the litigants, without resorting to any hard or fast rule.").

Turning to that analysis in the instant case, we agree with plaintiff that the circumstances are such that equity calls to error the trial court's refusal to appoint a receiver.

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As discussed *supra*, upon plaintiff's Motion for Appointment of Receiver after having completely "exhausted his remedy at law by the ordinary process of execution," *Coates Bros.*, 92 N.C. at 379, the relevant inquiry for the court became whether it appears that defendant might indeed be entitled to such unliquidated property, and if so, then whether the circumstances at issue are such that equity would warrant that the unliquidated claims and resulting judgments remain solely within defendant's control. *Neighbors*, 210 N.C. at 554, 187 S.E. at 797; see *Hurwitz*, 189 N.C. at 6-7, 126 S.E. at 173. Unless such equity-barring circumstances are present, it has been the law in this State for some time that plaintiff was entitled to have a receiver appointed "almost as of course[.]" *Coates Bros.*, 92 N.C. at 380, 379 ("In effectuating this purpose, it very frequently becomes necessary to grant relief by . . . the appointment of a receiver[.]").

In the case at bar, it is sufficient that the circumstances are such so as to indicate that plaintiff has potential causes of action against Universal and Burton. We need not express opinion as to the merits of those claims—that is for the receiver to decide. *Id.* at 381. Nor does the record reveal any equitable grounds on which the decision whether to pursue defendant's apparent claims against Universal and Burton ought to remain within her sole control. It is alleged that Universal and Burton are indebted to defendant as a result of acts in connection with the underlying litigation in the instant case, and that the proceeds of the claims could be used to satisfy plaintiff's injuries if defendant were to pursue them. Nevertheless, defendant refuses to do so, despite the fact that pursuit of the claims could benefit both parties. *E.g. Hurwitz*, 189 N.C. at 6-7, 126 S.E. at 173-74. If the receiver is able to prosecute defendant's claims to fruition, defendant will "be provided the protection afforded" therefrom; that is, defendant would be relieved of the burden of the judgment against her. *Investors Title Ins. Co. v. Herzig*, 330 N.C. 681, 689, 413 S.E.2d 268, 272 (1992). Moreover, any judgment obtained against Universal or Burton would be compensation merely for a monetary loss suffered by defendant incident to the underlying action, rather than for an unrelated injury purely "personal" to her so as to render its transfer inequitable despite statutory authorization. *Cf. Brantley v. CitiFinancial, Inc.*, 2015 Bankr. LEXIS 129, *9 (citing *In re LoCurto*, 239 B.R. 314 (Bankr. E.D.N.C. 1999)) (It is true that "the definition of personal injury [under section 1C-1601(a)(8)] is not limited to a physical bodily injury under North Carolina law; however, in order to fall under the exemption, the injury leading to the compensation should rise to a level of severe emotional distress" where it does not otherwise involve bodily injury.). Nor would pursuit and transfer to plaintiff of defendant's

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recovery from Universal and Burton result in plaintiff “receiving a wind-fall from another person’s injury.” *Herzig*, 330 N.C. at 689, 413 S.E.2d at 272. To the contrary, satisfaction of the outstanding judgment in the instant case and the potential recovery to defendant from Universal and/or Burton would be inextricably interwoven, with any transfer of the latter to plaintiff representing precisely that which the jury has determined plaintiff is owed. Indeed, plaintiff requested that the trial court appoint a receiver only over claims that are “related to matters that arose from the wreck which killed Julie Haarhuis[.]” Lastly, the outstanding judgment that defendant owes to plaintiff is significant, and there are no other apparent means by which defendant could satisfy the judgment. *See Oldham*, 84 N.C. at 308.

The confluence of these distinct factors “comes directly within the equitable principle[s] . . . which justif[y] and call[] for the appointment of a receiver” for the purpose of determining whether the merits of defendant’s claims against Universal and Burton are worth pursuing and, if so, prosecuting the same. *People’s Nat’l Bank v. Waggoner*, 185 N.C. 297, 302, 117 S.E. 6, 9 (1923). We therefore conclude that, in light of the circumstances at issue, it was error for the trial court to deny plaintiff’s Motion for Appointment of Receiver. *See Coates Bros.*, 92 N.C. at 385 (“It is sufficient that we are satisfied that the facts were such as to warrant and require the appointment of a receiver as demanded by the plaintiffs.”); *Oldham*, 84 N.C. at 308 (“And these [circumstances], in our opinion, entitle the defendant who is restrained from pursuing his legal rights, to the interposition of the Court in taking such action as [appointing a receiver]. The Court ought therefore to have granted the defendant’s motion”); *cf. Hurwitz*, 189 N.C. at 7, 126 S.E. at 174.

Conclusion

For the reasons set forth herein, the trial court’s order denying plaintiff’s Motion for Appointment of Receiver is

REVERSED.

Judge HUNTER, JR. concurs.

Judge DIETZ concurs by separate opinion.

DIETZ, Judge, concurring.

The Court’s holding in this case is compelled by the plain language of the applicable receivership statute enacted by our General Assembly.

IN RE J.B.

[261 N.C. App. 371 (2018)]

The outcome, as the appellees point out in their briefs, is at odds with common law principles that prohibit the assignment or transfer of personal injury claims. See *Investors Title Ins. Co. v. Herzig*, 330 N.C. 681, 688, 413 S.E.2d 268, 271 (1992). But the General Assembly can reject the common law by statute, and I agree that the plain language of N.C. Gen. Stat. § 1-363 indicates that the legislature did so here.

The appellees also argue, compellingly, that it is bad policy to permit a receiver to take a debtor's personal injury claim against a third party, prosecute it, and give the proceeds to creditors. The most common beneficiaries of this statute are not sympathetic individuals like Mr. Haarhuis, who lost his wife in a tragic accident— they are banks, debt collectors, and other businesses that frequently seek to enforce money judgments against low-income debtors who have no other assets besides their personal injury claim against a third party. But this Court is “an error-correcting body, not a policy-making or law-making one.” *Fagundes v. Ammons Dev. Grp., Inc.*, __ N.C. App. __, __, 796 S.E.2d 529, 533 (2017). Our role is not to weigh the merits of the policies underlying a statute, but to interpret and enforce the statute as it is written. Here, the General Assembly could have limited the types of claims subject to post-judgment receivership, but it chose not to. We must honor that policy decision by the legislative branch.

IN THE MATTER OF J.B.

No. COA17-1373

Filed 18 September 2018

Juveniles—delinquency—adjudication—right against self-incrimination—statutory mandate

The trial court erred in a juvenile delinquency adjudication by failing to advise the juvenile of his constitutional right against self-incrimination before he testified. The trial court's violation of the statutory mandate in N.C.G.S. § 7B-2405 required reversal where the juvenile's testimony admitting that he threw a pint of milk at his teacher was incriminating and therefore prejudicial.

Appeal by juvenile-appellant from orders entered 9 and 12 May 2017 by Judge David A. Strickland in Mecklenburg County Juvenile Court. Heard in the Court of Appeals 4 September 2018.

IN RE J.B.

[261 N.C. App. 371 (2018)]

*Geeta N. Kapur for juvenile-appellant.**Attorney General Joshua H. Stein, by Assistant Attorney General Janelle E. Varley, for the State.*

BRYANT, Judge.

Where the trial court failed to advise juvenile-appellant of his right against self-incrimination before he testified and incriminated himself, we reverse the trial court's orders on adjudication and delinquency and order a new trial.

On 9 May 2017, the Honorable Judge David H. Strickland presided over an adjudication hearing in the matter of J.B. (hereinafter juvenile-appellant) in Mecklenburg County Juvenile Court. The Mecklenburg County Department of Juvenile Justice and Delinquency Prevention filed seven petitions alleging juvenile-appellant committed five counts of assault on a government employee, one count of simple assault and one count of communicating threats. At the hearing, the State elected to dismiss six petitions and proceeded on one petition for assault on a government employee, a teacher.

On the morning of Friday, 21 October 2016, Jessica¹, juvenile-appellant's teacher at Lincoln Heights Academy, supervised her students as they ate breakfast in the cafeteria. At the time of the incident, fourteen-year-old juvenile-appellant, had been a student in Jessica's class since August 2016. Jessica testified that during breakfast, she noticed juvenile-appellant had turned around from his table and was talking to a student at another table. When she asked juvenile-appellant to turn around, he responded "F**k you, b**h" and threw a pint-sized carton of milk at her. The carton was closed when juvenile-appellant threw it, but opened as it hit Jessica's face resulting in irritation to her eye from the milk. Jessica went to urgent care but suffered no major injuries. Jessica was the State's only witness, and the State rested after her testimony, offering no additional evidence.

Juvenile-appellant made a motion to dismiss at the close of the State's case, and the trial court denied his motion. Defense counsel asked if they could call juvenile-appellant as a witness. The trial court said "Yes sir" and had juvenile-appellant take the witness stand. On direct-examination, juvenile-appellant testified that while he was in the cafeteria, a

1. For privacy purposes, we do not use the last name of the teacher.

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girl stepped on his shoe. When Jessica was made aware of the incident, her response was, “They [sic] just shoes.” “I got mad and threw the milk carton,” he stated, “[b]ecause they [sic] was new shoes, and then I was mad. I mean she—because she—the way she said it, she was like, ‘Man, they [sic] just shoes.’ And then I just got mad and just threw the milk carton.” He further admitted that he intended to hit Jessica in the moment out of frustration. Juvenile-appellant rested his case and renewed his motion to dismiss, which was denied.

After closing arguments, the trial court informed juvenile-appellant that he had forgotten to advise him of his right against self-incrimination prior to his testimony. The trial court asked juvenile-appellant if he understood and juvenile-appellant replied “yes.” Juvenile-appellant’s defense counsel moved for dismissal on the grounds that the trial court should have advised juvenile-appellant of his right against self-incrimination prior to his testimony. The trial court denied the motion, and juvenile-appellant’s counsel noted his exception for the record.

The trial court adjudicated juvenile-appellant delinquent as to the charge of assault on a government official and entered a Level III disposition order sentencing juvenile-appellant to six months of incarceration at a youth development center. Juvenile-appellant appealed.

On appeal, juvenile-appellant asserts that the trial court failed to advise him of his constitutional right against self-incrimination prior to allowing his testimony. Specifically, juvenile-appellant argues he was prejudiced by the trial court’s violation of the statutory mandate in section 7B-2405 of our General Statutes because the testimony was incriminating, and therefore, the violation constituted reversible error. We agree.

N.C. Gen. Stat. § 7B-2405 delineates the judicial process to be followed in adjudication proceedings to ensure the protection of juvenile rights. “In the adjudication hearing, the court *shall* protect the [privilege against self-incrimination] . . . to assure due process of the law.” N.C.G.S. § 7B-2405 (2017) (emphasis added). “The plain language of N.C. Gen. Stat. § 7B–2405 places an affirmative duty on the trial court to protect the rights delineated therein during a juvenile delinquency adjudication.” *In re J.R.V.*, 212 N.C. App. 205, 210, 710 S.E.2d 411, 414 (2011). “[A]t the very least, some colloquy [is required] between the trial court and juvenile to ensure the juvenile understands his right against self-incrimination before choosing to testify at his adjudication hearing.” *Id.* at 209, 710 S.E.2d at 413. Thus, failure to follow the statutory mandate

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when conducting an adjudication hearing constitutes reversible error unless proven to be harmless beyond a reasonable doubt. *See id.* at 208, 710 S.E.2d at 413.

Similarly in *J.R.V.*, the trial court failed to follow the statutory mandate to engage in a colloquy with the juvenile to protect his constitutional right against self-incrimination, and it was determined that the failure was error. However, in *J.R.V.*, our Court of Appeals held it was not prejudicial error where the juvenile's testimony denied the criminal allegations against him and was not incriminating. *See id.* at 209–10, 710 S.E.2d at 414.

Here, in the instant case, juvenile-appellant's testimony, which admitted that he committed an assault on his teacher, was incriminating and therefore prejudicial. The trial court had not inquired whether juvenile-appellant understood his right against self-incrimination before juvenile-appellant testified. It was only after juvenile-appellant offered his testimony that the trial court stated:

You can stand up, please, sir. I forgot to advise you that—prior to your testimony that you do have the right to remain silent and that any statements you said in your testimony . . . Just you understand that, in this type of hearing, that anything you say about the charge may be used against you as evidence. Do you understand that?

Directly asking whether juvenile-appellant understood those rights after his testimony was given is not sufficient to satisfy the requirements under § 7B–2405. Therefore, the trial court's actions were clearly erroneous.

Accordingly, in finding error in the trial court's failure to advise juvenile-appellant of his right against self-incrimination, we find the error was not harmless beyond reasonable doubt. Prior to juvenile-appellant's testimony, the State offered Jessica's testimony to establish the basis of the assault charge that juvenile-appellant threw the milk carton hitting her in the face. Here, during his testimony, juvenile-appellant made incriminating statements as he admitted to throwing the milk carton out of frustration. Not only was juvenile-appellant's admission to the assault charge incriminating, the State used the admission to further support the assertion that juvenile-appellate was a "disruptive student" deeming incarceration as the only suitable remedy for his actions. This confirms that juvenile-appellant's testimony and the manner in which the State attempted to use the testimony was prejudicial. Had juvenile-appellate been properly advised of his right, he quite possibly would not have implicated himself.

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As the trial court failed in its affirmative duty to protect juvenile-appellant's constitutional right against self-incrimination, the trial court's orders of adjudication and delinquency are

REVERSED AND REMANDED FOR NEW TRIAL.

Judges HUNTER, JR., and ARROWOOD concur.

NATIONSTAR MORTGAGE, LLC, PLAINTIFF

v.

CLARENCE E. DEAN, JR. AND KELLY ANN DEAN,
AND WELLS FARGO BANK, N.A., DEFENDANTS

No. COA18-132

Filed 18 September 2018

1. Reformation of Instruments—deed of trust—mutual intention to encumber property

In an action to reform a deed of trust that was inadvertently recorded without the necessary property description attached, borrowers did not present evidence to rebut the presumption that the deed was intended by both borrowers and the bank to encumber the property as a first lien.

2. Jurisdiction—reformation of deed of trust—standing—holder of instrument

In an action to reform a deed of trust that was inadvertently recorded without the necessary property description attached, the bank holding the note had standing to seek reformation even if it did not own the note, since the holder of a note qualifies as a real party in interest which may enforce the note and the deed of trust.

3. Statutes of Limitation and Repose—reformation of deed of trust—applicable statute of limitation

In an action to reform a deed of trust that was inadvertently recorded without the necessary property description attached, the applicable statute of limitations was the more specific statute regarding sealed instruments (N.C.G.S. § 1-47(2), a ten-year time period), rather than the more general statute regarding fraud or mistake (N.C.G.S. § 1-52(9), a three-year period), because the explicit language of the disputed deed of trust indicated it was a sealed

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instrument; between two possible statutes, the specific controls over the general.

4. Equity—reformation of deed of trust—unclean hands—collateral matters

In an action to reform a deed of trust that was inadvertently recorded without the necessary property description attached, the doctrine of unclean hands did not bar the reformation claim asserted by the holder of the note, where the alleged oral agreements with the mortgagors to restructure and modify the loan were made years after the deed of trust was executed and were therefore wholly collateral to the transaction for which relief was sought.

5. Evidence—motion to strike—affidavits—prejudice analysis

In an action to reform a deed of trust that was inadvertently recorded without the necessary property description attached, even assuming arguendo the trial court erred by overruling motions to strike affidavits supportive of the holder of the note (the party seeking reformation), borrowers were not prejudiced because the holder of the note was entitled to summary judgment on its reformation claim.

Appeal by defendants from order and judgment entered 8 September 2017 by Judge Marvin K. Blount, III in Dare County Superior Court. Heard in the Court of Appeals 23 August 2018.

Burr & Forman, LLP, by William J. Long, Matthew W. Barnes and E. Travis Ramey, pro hac vice, for plaintiff-appellee.

Hornthal, Riley, Ellis & Maland, LLP, by M.H. Hood Ellis, for defendant-appellants.

TYSON, Judge.

Clarence E. Dean, Jr. and Kelly Ann Dean appeal from the trial court's order, which granted Nationstar Mortgage, LLC's ("Nationstar") motion for summary judgment on Nationstar's declaratory judgment claim, and alternatively granted Nationstar's claim to reform a deed of trust. We affirm.

I. Background

In 2003, Clarence E. Dean, Jr. and his brother-in-law, Jerry Shanahan, formed a limited partnership, 505 N Virginia Dare, L.P.

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Mr. Dean and Mr. Shanahan purchased the Tanglewood Motel located at the address of 505 N. Virginia Dare Trail, Kill Devil Hills, N.C. and took title in the name of their limited partnership. After operating the Tanglewood Motel for a rental season, Mr. Dean and Mr. Shanahan demolished the motel and built two large beach cottages with financing acquired from First South Bank.

Approximately a year later, 505 N Virginia Dare, L.P. subdivided and conveyed one cottage and lot to Mr. Shanahan and the other cottage and lot to Mr. Dean (“the Property”). The subdivided property’s previous address of 505 N. Virginia Dare Trail remained with the lot conveyed to Mr. Shanahan. The Property conveyed to Mr. Dean carried the street address of 507 N. Virginia Dare Trail, Kill Devil Hills, N.C. 27948-7828.

In June 2004, Mr. Dean and his wife, Kelly Ann Dean (collectively “the Deans”), pledged the Property as collateral to secure a \$1,820,000 loan from First South Bank. The Deans retained an attorney, Charles D. Evans, to prepare a deed of trust and close the loan, and granted him a power of attorney to execute and record the loan documents on their behalf. The property description in the deed of trust stated “See Attached Exhibit A” and stated the property has the address of “**507 N VIRGINIA DARE TRAIL, KILL DEVIL HILLS**, North Carolina **27948-7828** (“Property Address”).” (Emphasis original). Mr. Evans recorded the deed of trust (“First South Deed of Trust” or “Original Deed of Trust”) on 1 June 2004 with the Dare County Register of Deeds, but failed to include “Exhibit A.” Exhibit A contained the platted lot and block number of the Property. On 16 November 2004, First South Bank sent a letter to Mr. Evans advising him “The Deed of Trust was not recorded with the legal description. Please [add] the legal description and re-record the Deed of Trust.”

Mr. Evans re-recorded the First South Deed of Trust on 24 November 2004 without the Deans’ knowledge and attached Exhibit A. Mr. Evans noted the following on the first page of the re-recorded First South Deed of Trust:

This deed of trust is being re-recorded to add the Exhibit “A” which was omitted

s/ Charles D. Evans

Charles D. Evans, Attorney

11/22/04

On 27 October 2004, the Deans granted a deed of trust (“Wachovia Deed of Trust”) to Wachovia Bank, N.A in the amount of \$500,000, which

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was recorded with the Dare County Register of Deeds on 18 November 2004. The Deans allegedly granted Wachovia this deed of trust in exchange for a second-position lien on the Property. Wells Fargo Bank, N.A. (“Wells Fargo”) later became the owner and holder of the Wachovia Deed of Trust.

In 2011, the Deans missed a payment on their loan with First South Bank. Aurora Bank FSB (“Aurora”), Nationstar’s predecessor-in-interest, was servicing the Deans’ loan at the time. The Deans asserted an employee of Aurora contacted them and advised them to miss another payment, so that “Aurora could work with [the Deans] and make some accommodation[.]” The Deans intentionally missed another payment and Aurora purportedly orally agreed to enter into a forbearance agreement.

Aurora mailed the Deans a proposed “Special Forbearance Agreement” with an attached cover letter. The cover letter instructed the Deans to:

Please execute the attached Special Forbearance Agreement and return it along with . . . your initial payment in the amount of \$14240.24. This payment as well as the requested information must be received in our office *on or before 11/15/2011*. (Emphasis supplied).

The proposed “Special Forbearance Agreement” states the Deans had accrued a total arrearage of \$65,444.07 on their loan as of 7 November 2011. According to the Deans, they did not receive the proposed “Special Forbearance Agreement” and cover letter until after the 15 November 2011 deadline for returning the document had passed. On 28 November 2011, Aurora sent the Deans a letter informing them that their “request for a foreclosure alternative option is considered closed” because “[w]e did not receive one of the req[ui]red payments under your forbearance agreement.”

On 6 December 2011, the Deans received notice Aurora was initiating foreclosure proceedings. On 15 June 2012, Aurora sent a letter to the Deans informing them the servicing of the loan was being transferred to Nationstar. During this time, the hearings in the foreclosure proceeding were continued.

According to the Deans, on 17 August 2012, a Nationstar representative, allegedly named “Lisa,” contacted Mr. Dean and they purportedly orally negotiated the terms of a restructured and modified loan to avoid foreclosure. When the Deans received the modification documents from Nationstar, the terms stated in the documents were different from the

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terms which had allegedly been negotiated over the telephone between Mr. Dean and “Lisa.”

The Deans retained another attorney, Jane Dearwester, to communicate with Nationstar on their behalf. Ms. Dearwester sent a letter to Nationstar on 27 August 2012 and advised them that the terms contained in the modification documents were different than the orally negotiated terms. On 29 October 2012, Nationstar sent an additional set of modification documents to the Deans, but these documents were identical to the documents which were sent earlier in August 2012. Attorney Dearwester sent yet another letter to Nationstar expressing that the new set of modification documents was identical to the last set Nationstar had sent.

On 7 November 2012, an employee of Nationstar, Brittanee Clark, purportedly contacted the Deans to confirm that the terms set forth in the two previously sent sets of modification documents were not the same as to the terms Nationstar had allegedly agreed to over the phone on 17 August 2012. However, on 14 November 2012, Ms. Clark emailed the Deans to inform them Nationstar would not honor the terms discussed in the phone conversation between Mr. Dean and “Lisa.”

On 1 July 2013, Nationstar filed a verified complaint against the Deans and Wells Fargo seeking: (1) a declaration that the First South Deed of Trust is a valid encumbrance on the Property; (2) in the alternative, judicial reformation of the First South Deed of Trust to include the legal description contained within Exhibit A and relating back to 1 June 2004; and, (3) in the alternative, an order quieting title; and, (4) a declaration that the First South Deed of Trust has priority over the Wachovia Deed of Trust. No further action was taken in the foreclosure proceedings against the Property once Nationstar’s verified complaint was filed.

The Deans initially filed an answer, and later an amended answer on 13 June 2014. In their amended answer, the Deans asserted, in part, the doctrine of unclean hands and the statute of limitations against Nationstar’s reformation claim.

On 29 September 2014, the trial court entered a consent order between Nationstar and Wells Fargo, which ordered:

1. That the First South Deed of Trust is a valid encumbrance on the Property having a priority date of June 1, 2004.
2. That the First South Deed of Trust has priority over the Wachovia Deed of Trust[.]

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The consent order dismissed Nationstar's remaining claims against Wells Fargo.

Following discovery, Nationstar filed a motion for summary judgment on 21 March 2017. The Deans filed four affidavits in opposition to Nationstar's motion for summary judgment, including the affidavits of Mr. Dean; Jane Dearwester; Claire Ellington, an assistant to Jane Dearwester; and, Laura Elizabeth Ceva, an attorney who worked with Jane Dearwester.

Following a hearing on Nationstar's motion for summary judgment, the trial court entered an order granting summary judgment in Nationstar's favor. With respect to Nationstar's declaratory judgment claim, the trial court's order decreed that the street address for the Property listed in First South's Original Deed of Trust "is a legally sufficient description as of June 1, 2004 when said Deed of Trust was recorded." The trial court's order alternatively decreed that the First South Deed of Trust be "reformed as of June 1, 2004 to include 'Exhibit A' originally omitted, but subsequently included in the Deed of Trust as was re-recorded on November 24, [2004.]"

The Deans filed timely notice of appeal from the trial court's order granting Nationstar's motion for summary judgment.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2017).

III. Standard of Review

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). The trial court must deny a summary judgment motion if any genuine issue of material fact exists. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). An issue of fact is genuine where supported by substantial evidence, and "is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

"Moreover, . . . all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Page v. Sloan*,

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281 N.C. 697, 706, 190 S.E.2d 189, 194 (1972) (internal quotation marks and citations omitted). A verified complaint may be treated as an affidavit for summary judgment purposes if it: “(1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.” *Id.* at 705, 190 S.E.2d at 194 (citing N.C. Gen. Stat. § 1A-1, Rule 56(e)).

This Court reviews appeals from a trial court’s grant of summary judgment *de novo*. *Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 81, 712 S.E.2d 221, 226 (2011).

IV. Analysis

The Deans argue the trial court erred by granting Nationstar’s motion for summary judgment. They assert genuine issues of material fact exist to preclude summary judgment on Nationstar’s declaratory judgment and reformation claims.

We first address the Deans’ argument with regard to the trial court’s grant of summary judgment on Nationstar’s reformation claim. The Deans contend their evidentiary forecast was sufficient to show a genuine issue of material fact exists on whether the applicable statute of limitations bars Nationstar’s claim for judicial reformation of the First South Deed of Trust. The Deans also contend a disputed genuine issue of material fact exists on whether Nationstar and Aurora’s prior conduct bars an award of equitable relief.

A. Judicial Reformation

[1] Nationstar seeks to reform the Original Deed of Trust, recorded on 1 June 2004, to include the omitted Exhibit A. “Reformation is a well-established equitable remedy used to reframe written instruments where, through mutual mistake or the unilateral mistake of one party induced by the fraud of the other, the written instrument fails to embody the parties’ actual, original agreement.” *Metropolitan Property And Cas. Ins. Co. v. Dillard*, 126 N.C. App. 795, 798, 487 S.E.2d 157, 159 (1997) (citation omitted).

The trial court has the authority to reform a deed of trust. Deeds of trust are written instruments that are subject to reformation claims. *Noel Williams Masonry v. Vision Contractors of Charlotte*, 103 N.C. App. 597, 603, 406 S.E.2d 605, 608 (1991). “In an action for reformation of a written instrument, the plaintiff has the burden of showing that the terms of the instrument do not represent the original understanding of the parties” *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 651, 273 S.E.2d 268,

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270 (1981) (citations omitted). “If the evidence is strong, cogent, and convincing that the deed, as recorded, did not reflect the agreement between the parties due to a mutual mistake caused by a drafting error, a deed can be reformed.” *Drake v. Hance*, 195 N.C. App. 588, 592, 673 S.E.2d 411, 414 (2009) (citing *Parker v. Pittman*, 18 N.C. App. 500, 505, 197 S.E.2d 570, 573 (1973)).

“There is a strong presumption in favor of the correctness of the instrument as written and executed, for it must be assumed that the parties knew what they agreed and have chosen fit and proper words to express that agreement in its entirety.” *Hice*, 301 N.C. at 651, 273 S.E.2d at 270 (internal quotation marks, citation, and emphasis omitted). “[E]quity for the reformation of a deed or written instrument extends to the inadvertence or mistake of the draftsman who writes the deed or instrument.” *Crews v. Crews*, 210 N.C. 217, 221, 186 S.E. 156, 158 (1936) (citation and internal quotation marks omitted).

No genuine issue of material fact exists that the Deans and First South Bank mutually intended for the First South Deed of Trust to encumber the Property as a first lien. The First South Deed of Trust would have contained the parties’ intended legal description of the Property, but for the Deans’ closing attorney’s mistake of inadvertently failing to attach Exhibit A to the First South Deed of Trust when he initially recorded it on 1 June 2004.

The Deans failed to present evidence to dispute that they, along with First South Bank, mutually intended for the First South Deed of Trust to include Exhibit A and contain the legal description contained therein.

B. Standing

[2] The Deans contend a disputed genuine issue of material fact exists of whether Nationstar is a real party in interest and possesses standing to assert its reformation claim. They assert Nationstar has not produced evidence to show it is the owner or holder of the note secured by the First South Deed of Trust.

The Deans argue a supposed conflict of evidence exists between Nationstar’s verified complaint and Nationstar’s response to the Deans’ request for admissions to foreclose summary judgment. In Nationstar’s verified complaint, it averred it is “now the owner and holder of the Loan and the First South Deed of Trust.” In Nationstar’s response to the Deans’ request for admissions, it stated “The owner of the promissory note is Wells Fargo[.]” However, Nationstar also stated in the Deans’ request for admissions that it is the holder, and is in possession, of the original promissory note the Deans’ granted to First South Bank.

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This apparent conflict between whether Wells Fargo or Nationstar is the *owner* of the note is immaterial to Nationstar's standing to seek reformation of the First South Deed of Trust. As noted, there are multiple notes and deeds of trust on record which affect this Property.

Under the Uniform Commercial Code, the holder of an instrument may enforce it, even if the holder is not the owner of the instrument. N.C. Gen. Stat. § 25-3-301 (2017). Therefore, the holder of a note "qualifies as a real party in interest" in an action upon the note. *In re Foreclosure of Webb*, 231 N.C. App. 67, 69-70, 751 S.E.2d 636, 638 (2013). Under our precedents, "the holder of a note [secured by a Deed of Trust] can enforce both the note and the Deed of Trust." *Greene v. Tr. Servs. of Carolina, LLC*, 244 N.C. App. 583, 593, 781 S.E.2d 664, 671-72 (2016) (citing N.C. Gen. Stat. § 47-17.2 (2013)).

Uncontradicted evidence in the form of Nationstar's verified complaint and admissions indicates Nationstar is the holder of the note secured by the First South Deed of Trust. The Deans assert no evidence to either refute or create a genuine issue of material fact regarding Nationstar's status as the holder of the original First South note. The Deans' argument is overruled.

C. Statute of Limitations

[3] The Deans also argue the statute of limitations bars Nationstar's reformation claim. The Deans assert the three-year statute of limitations of N.C. Gen. Stat. § 1-52(9) for claims based in "fraud or mistake" applies. N.C. Gen. Stat. § 1-52(9) specifies a three-year limitations period "[f]or relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." N.C. Gen. Stat. § 1-52(9) (2017).

Nationstar asserts the applicable statute of limitations is N.C. Gen. Stat. § 1-47(2), which provides ten years to commence an action "[u]pon a sealed instrument or an instrument of conveyance of an interest in real property, against the principal thereto." N.C. Gen. Stat. § 1-47(2) (2017).

According to well-established canons of statutory construction, "[w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." *Fowler v. Valencourt*, 334 N.C. 345, 349, 435 S.E.2d 530, 532 (1993) (quoting *Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985)). "When two statutes apparently overlap, it is well established

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that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control.” *Id.* at 349, 435 S.E.2d at 533 (quoting *Trs. of Rowan Tech.*, 313 N.C. at 238, 328 S.E.2d at 279).

Here, the signature section of the First South Deed of Trust, as originally recorded on 1 June 2004, explicitly shows the instrument was signed under seal by the Deans’ closing attorney, under the authority of the Deans’ executed power of attorney, and on their behalf. It states, in relevant part: “BY SIGNING UNDER SEAL BELOW, Borrower accepts and agrees to the terms and covenants contains in pages 1 through 12 of this Security Instrument” The word “Seal” is affixed in parentheses beside each signature line, including the signature lines for Clarence E. Dean, Jr. and Kelly A. Dean.

The Deans do not challenge that they intended for their closing attorney, Charles D. Evans, to prepare and sign the First South Deed of Trust on their behalf and under their power of attorney. The First South Deed of Trust is clearly a sealed instrument and is indisputably “an instrument of conveyance of an interest in real property.” N.C. Gen. Stat. § 1-47(2); see *Allsbrook v. Walston*, 212 N.C. 225, 228, 193 S.E. 151, 151-52 (1937) (holding the word seal next to a signature line is sufficient to make the document a sealed instrument).

As between N.C. Gen. Stat. §§ 1-47(2) and 1-52(9), the former is the more specific statute of limitations that applies to Nationstar’s reformation claim under the ten-year limitations period. No genuine issue of material fact exists that Nationstar filed its verified complaint on 26 June 2013, which is within ten years of the execution of the First South Deed of Trust on 1 June 2004.

D. Unclean Hands

[4] The Deans assert the doctrine of unclean hands equitably bars, or estops, Nationstar from bringing its reformation claim. The doctrine of unclean hands is based upon the premise, “he who comes into equity must come with clean hands.” *S.T. Wooten Corp. v. Front St. Constr. LLC*, 217 N.C. App. 358, 362, 719 S.E.2d 249, 252 (2011).

The Deans base their unclean hands argument upon the allegation that Nationstar’s predecessor-in-interest, Aurora, instructed the Deans to intentionally miss a payment on their loan to allow for a modification. Aurora allegedly agreed to loan modifications, but then sent the forbearance agreement too late for the Deans to return it by the stated deadline.

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The Deans also contend Nationstar and Aurora reneged on oral agreements to restructure and modify the loan to avoid foreclosure.

If Nationstar and Aurora did make the alleged representations and oral agreements to modify the Deans' loan, such agreements would be barred by the statute of frauds. The Deans' loan under the note and First South Deed of Trust was \$1,820,000. N.C. Gen. Stat. § 22-5 requires a signed writing for all commercial loan commitments in excess of \$50,000. N.C. Gen. Stat. § 22-5 (2017).

Presuming, *arguendo*, Nationstar cannot equitably assert the statute of frauds, the doctrine of unclean hands would still be inapplicable to bar Nationstar's reformation claim.

This Court has held that equitable "relief is not to be denied because of general iniquitous conduct." *Ray v. Norris*, 78 N.C. App. 379, 384, 337 S.E.2d 137, 141 (1985) (citation omitted). If "the alleged misconduct giving rise to the assertion of unclean hands arises out of matters which are merely collateral to the transaction for which equitable relief is sought, the equitable remedy is not barred." *S.T. Wooten*, 217 N.C. App. at 362, 719 S.E.2d at 252. Here, the transaction, for which Nationstar seeks equitable relief of reformation, concerns the execution and recordation of the First South Deed of Trust on 1 June 2004. The alleged oral promises of Aurora to modify the terms of the loan secured by the First South Deed of Trust were made years after the First South Deed of Trust was executed and are wholly collateral to the original transaction completed on 1 June 2004. *See id.*

Based upon uncontradicted "clear, cogent, and convincing evidence," the Deans and First South Bank intended for the First South Deed of Trust to encumber the Property. Except for the Deans' closing attorney's error, the First South Deed of Trust would have included the full legal description in Exhibit A. Nationstar has standing to assert its reformation claim, as successor-in-interest to First South Bank and as holder of the note secured by the First South Deed of Trust. *See* N.C. Gen. Stat. § 25-3-301; *Greene*, 244 N.C. App. at 593, 781 S.E.2d at 671-72. Nationstar brought its reformation claim within the applicable ten-year statute of limitations. N.C. Gen. Stat. § 1-47(2). The doctrine of unclean hands does not bar Nationstar's reformation claim. The Deans' arguments are overruled.

[5] The Deans also assert the trial court erred by overruling their motions to strike the affidavits of Siggle Shaw and Meredith Guns, submitted by Nationstar. Siggle Shaw's affidavit was offered by Nationstar to refute the Deans' affirmative defense of the three-year statute of limitations.

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Siggle Shaw averred that Aurora and Nationstar had no notice of Exhibit A's absence from the original First South Deed of Trust until a title search was conducted in preparation for Aurora initiating foreclosure in December 2011. Presuming, *arguendo*, the trial court erred in overruling the Deans' motion to strike, because the ten-year, and not the three-year, statute of limitations applies, the Deans cannot show prejudice.

The affidavit of Meredith Guns was offered by Nationstar in support of its declaratory judgment claim to have the street address in the First South Deed of Trust declared a legally sufficient description. *See, e.g.*, 1 James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 10.41 (Patrick K. Hetrick & James B. McLaughlin, Jr., eds., 6th ed. 2011) ("While not advisable, buildings are sometimes described by reference to street and number in conveyances of city land."). Her affidavit concerns the street numbering system in the incorporated Town of Kill Devil Hills, N.C. Meredith Guns' affidavit raises no genuine issue of material fact with regards to Nationstar's reformation claim. Presuming, *arguendo*, the trial court erred in overruling the Deans' motion to strike, the Deans cannot show prejudice because Nationstar was entitled to summary judgment on its reformation claim.

V. Conclusion

The Deans have failed to show any genuine issues of material fact exists to preclude summary judgment for Nationstar. The trial court did not err by entering its order decreeing the First South Deed of Trust reformed to include the later recorded Exhibit A. Because the trial court was warranted in awarding Nationstar summary judgment on its reformation claim, it is unnecessary to address the Deans' remaining arguments concerning Nationstar's declaratory judgment claim. The order of the trial court granting summary judgment to Nationstar is affirmed. *It is so ordered.*

AFFIRMED.

Judges INMAN and BERGER concur.

QUEVEDO-WOOLF v. OVERHOLSER

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CELINA QUEVEDO-WOOLF, PLAINTIFF

v.

MERRY EILEEN OVERHOLSER AND DANIEL CARTER, DEFENDANTS

No. COA17-675 and COA17-1344

Filed 18 September 2018

1. Appeal and Error—preservation of issues—Rule 59 motion—sufficiency of allegations

The Court of Appeals elected to treat plaintiff mother's appeal in a child custody action as a writ of certiorari where she failed to timely appeal from the trial court's custody order and her purported Rule 59 motion did not contain sufficient allegations to toll the thirty-day period for appeal.

2. Child Custody and Support—jurisdiction—Uniform Child Custody and Jurisdiction Enforcement Act—modification of out-of-state order

The trial court had jurisdiction to modify a prior child custody order entered in Florida pursuant to the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA), based on undisputed findings that North Carolina was the child's "home state" and that none of the relevant persons were residents of Florida during the period of time at issue. Florida ceased to have exclusive, continuing jurisdiction once the jurisdictional requirements for modification were met in North Carolina. Further, any violation of a Florida statute that may have occurred as a result of the grandmother (defendant) moving the child to North Carolina did not affect North Carolina's jurisdiction under the UCCJEA.

3. Appeal and Error—preservation of issues—full faith and credit—out-of-state child custody order

In an action to modify a child custody order entered in Florida, plaintiff (the child's mother) failed to preserve for appellate review the issues that North Carolina applied the wrong law and did not give full faith and credit to the Florida order where she sought to modify custody pursuant to North Carolina law, not Florida law. The trial court erred in considering plaintiff's arguments on these issues in her purported Rule 59 motion for a new trial because she failed to preserve them by raising these objections at trial.

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4. Child Custody and Support—custody modification—conduct inconsistent with protected status as parent—sufficiency of findings and conclusions

In an action to modify a child custody order entered in Florida, the trial court's determination that plaintiff mother acted inconsistently with her constitutionally protected status as parent to her daughter was supported by clear and convincing evidence that the mother did not maintain meaningful contact with the child for several years and did not make any formal attempt to regain custody from the child's grandmother (defendant), aside from one abandoned court filing, for over six years.

5. Child Custody and Support—jurisdiction—subsequent order—different judge

In an action to modify a child custody order entered in Florida, a second North Carolina trial judge had no jurisdiction to enter an order on multiple bases: first, as previously decided, plaintiff mother's purported Rule 59 motion for a new trial was not a valid Rule 59 motion; and second, the subsequent judge had no subject matter jurisdiction to consider plaintiff's motion for a new trial where the initial trial court judge properly entered the order from which plaintiff sought relief, because a trial judge who did not try a case may not rule upon a motion for a new trial. Since the second judge had no subject matter jurisdiction, it was also improper for the judge to issue rulings regarding the choice of law in the case.

6. Child Custody and Support—jurisdiction—prior orders on appeal—subsequent order void

In an action to modify a child custody order entered in Florida, the trial court's entry of an order modifying custody was invalid for lack of jurisdiction because prior custody orders were on appeal; as a result, the child was improperly removed from defendant grandmother's custody.

7. Child Visitation—orders entered pending appeal—prior order controls

In an action to modify a child custody order entered in Florida, where several orders were deemed void and vacated by the Court of Appeals, the last prior order regarding visitation of the child with plaintiff mother controlled.

Judge BRYANT concurring in the result only.

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Appeal by Plaintiff from order entered 16 May 2016 by Judge Marshall Bickett and appeal by Defendant Overholser from order entered 17 November 2016 by Judge James F. Randolph in District Court, Rowan County. Heard in the Court of Appeals 19 February 2018. Appeal by Defendant Overholser from order entered 28 March 2017, *nunc pro tunc* 14 March 2017, by Judge James F. Randolph in District Court, Rowan County. Heard in the Court of Appeals 6 August 2018.

Woodruff Law Firm, PA, by Carolyn J. Woodruff and Jessica Snowberger Bullock, for Plaintiff.

Hoffman Law Firm, PLLC, by James P. Hoffman, Jr., for Defendant Overholser.

McGEE, Chief Judge.

I. Factual and Procedural History***A. General***

Celina Quevedo-Woolf (“Plaintiff”) and Daniel Carter (“Carter”) had a brief romantic relationship that resulted in the birth of E.R.Q., a girl, on 19 July 2005. Carter has had minimal involvement in E.R.Q.’s life and is not a party to this appeal. Plaintiff’s mother, Merry Eileen Overholser (“Defendant”) has raised E.R.Q. since infancy. When Plaintiff realized she was pregnant she moved in with Defendant, who was living in Defendant’s mother’s house (the “house”), in Palm Beach County, Florida. After E.R.Q. was born, Plaintiff continued to live with Defendant. Though E.R.Q. initially slept in Plaintiff’s room, for the majority of the time Plaintiff and E.R.Q. were living in the house, E.R.Q. slept in Defendant’s room.

Plaintiff moved out of the house around the time of E.R.Q.’s first birthday, leaving E.R.Q. with Defendant, because, according to Plaintiff, Plaintiff was not getting along with Defendant, and for “stability for E.R.Q.” Plaintiff testified she left E.R.Q. with Defendant because E.R.Q. already “kn[ew] my mother and kn[ew] that house, [so] it seemed like a logical thing at the time as opposed to me moving out into a friend’s house, which I did, and [E.R.Q.] not being familiar with the situation or anything like that.” Plaintiff’s initial apartment was nearby, and Plaintiff testified she visited E.R.Q. but that “it was kind of sporadic,” “weekly.” Plaintiff never kept E.R.Q. overnight during this initial period.

In order for Defendant to have the authority to make decisions necessary for raising E.R.Q., such as decisions for medical care, Defendant

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asked Plaintiff to give Defendant legal and physical custody of E.R.Q. Plaintiff agreed, and the Circuit Court of the Fifteenth Judicial Circuit for Palm Beach County, Florida (the “Florida court”), entered an “Order for Temporary Custody” on 2 November 2006 (the “Florida Order”), giving sole legal and physical custody of E.R.Q. to Defendant. E.R.Q. was one year old at the time. The Florida Order allowed Plaintiff to petition for the return of custody of E.R.Q. to Plaintiff. After Defendant obtained custody, Plaintiff continued to have semi-regular contact with E.R.Q., but E.R.Q. lived full-time with Defendant and Defendant made all relevant decisions related to the care of E.R.Q. In 2007, Defendant filed for, and obtained, an order for child support from Plaintiff.

In June of 2008, when E.R.Q. was approximately three years old, Defendant and E.R.Q. moved with Defendant’s girlfriend at the time, Janet Kresge (“Kresge”), to Rowan County, North Carolina. Defendant had been a special education teacher since 1984, and continued working in that capacity in North Carolina. Plaintiff testified she did not want Defendant to leave Florida with E.R.Q., but Defendant testified that, when she discussed with Plaintiff the idea of moving to North Carolina, Plaintiff “thought it was a great idea and [Plaintiff] said she was coming” to North Carolina to be near E.R.Q. Plaintiff did not move to North Carolina, and did not visit E.R.Q. in Rowan County until October 2008, when Defendant purchased Plaintiff a plane ticket for that purpose. A note written by Kresge concerning that time period stated:

April, 2008. Discussed moving [with Plaintiff]. Better standard of living, et cetera. Was told [Plaintiff] would follow in a few months. Looked for apartments. Sent info to [Plaintiff]. October, 2008 visit [–] three days. [Plaintiff] [s]pent most of time on computer or phone. Did not spend . . . quality time [with E.R.Q.]. Promised to be back for Thanksgiving. No contact.

Defendant testified that, based upon her own observations, what Kresge had written in the note was correct. Plaintiff’s next visit with E.R.Q. did not occur until May of 2011, approximately two and a half years after the October 2008 visit. The May 2011 visit was a day visit that lasted only a few hours.

Defendant testified that she and Kresge offered to let Plaintiff live with them and E.R.Q., but Plaintiff did not take them up on that offer. Defendant further testified:

A After [Plaintiff] came in October [2008] I did not hear from her for quite some time.

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Q Was it true that [Plaintiff] didn't have your phone number when you lived in North Carolina?

A No.

....

Q Do you know where [Plaintiff] was at during that period of time when she had no contact?

A No, I don't.

Q When you say no contact, do you mean no phone calls, no visits, or what?

A Correct. There were – there were no visits from – the next visit did not happen until [3] May, 2011. [Plaintiff] did call on – there were a couple of Christmases where she called. I remember one phone call at Christmas time, and it had been quite a while since I had spoken to her, where she – she told me that she was suicidal and some other things, and things surrounding why she felt that way. There was another phone call. She usually called like May, May and December. And I remember one May she called and I said something to her about [E.R.Q.]'s birthday the previous year. That she never called [E.R.Q.]. And I said, "Why didn't you do that? You didn't even call her?" And she said, "Mom, honestly I forgot." And then there was May of – I believe it was 2010, because [Kresge] was still there. And we were in the backyard and [Plaintiff] called and she just started screaming at me, "Give her back to me. You have to give her back to me. She's mine. I'm coming to get [E.R.Q.]." And I said, "[Plaintiff], you don't even know her." And she said, "Well, that's okay. I'll come for the weekend and I'll spend the weekend with her and then I'm taking her back with me." And I said, "No." And it was like I had to try to talk her down.

Q So we're talking about – and I want to make sure I'm right on this. We're talking [6] October, 2008, well into May of 2011 here [that Plaintiff had no physical contact with E.R.Q.], right?

A Yes.

....

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Q Did you go through periods like that where you wouldn't hear from [Plaintiff] for a long time and then suddenly you would get demands to turn [E.R.Q.] over to her?

A Yes.

Q Do you even know where [Plaintiff] was living at that point in time or who she was living with?

A No. I know at one point [Plaintiff] told me that she married Michael. And I didn't know – I don't believe I knew specifically where she lived.

Q Did you know that [Plaintiff had] married a guy – or had moved to West Virginia for a while or something, or was that later?

A That was Michael[.] And my recollection is that when we had – we had talked about moving – we had all talked about moving to North Carolina, and [Plaintiff] said it was a great idea and she was all gung-ho. And then – and then at that point I'm not sure if they were living – I know for a while [Plaintiff and Michael] were living in an apartment. For a little while I think they were living with Michael's mother. And we had looked at a house online [for Plaintiff in North Carolina]. So . . .

Q When you say “we looked at a house online,” who looked at a house online?

A [Plaintiff] and I and [Kresge].

Uncontested findings of fact from the order Plaintiff appeals in this matter – Judge Marshall Bickett's 16 May 2016 Custody Order (the “Bickett Order”) – show that Defendant moved to North Carolina with E.R.Q. in June of 2008, and that Plaintiff visited E.R.Q. in North Carolina in October of 2008.

On 1 June 2009, approximately eight months after Plaintiff's October 2008 visit with E.R.Q. in North Carolina, Plaintiff filed a motion in Florida requesting that the Florida Order be terminated and that custody of E.R.Q. be returned to Plaintiff. In that motion, Plaintiff alleged the following as grounds for regaining custody of E.R.Q.: “I have maintained steady employment and have proper housing for [E.R.Q.]. I am also recently married[.]” and that E.R.Q. “would be back with the birth mother, and [she] would be better off living back in Florida with me and her immediate family.” Three months later, on 1 September 2009,

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Plaintiff sent Defendant an email stating that she wanted to regain custody of E.R.Q. Plaintiff stated that signing custody of E.R.Q. over to Defendant “was the best thing for [E.R.Q.] at that time and I don’t regret my decision but [E.R.Q.] belongs with me[.]” Plaintiff stated that sometimes she felt like Defendant did not love her, “[b]ut when I think that I always revert back to my past because if you didn’t love me you wouldn’t support me the way that you did.” Plaintiff stated: “I am not going anywhere and I have every intention of fighting to get my wonderful daughter home with me.”

Approximately eight months later, on 4 May 2010, the Florida court entered a “Notice of Lack of Prosecution” in which it informed Plaintiff that there had been “no activity” in the action “for a period of 10 months immediately preceding service of this notice” and that absent some action on the part of Plaintiff to move the matter forward within sixty days, a hearing would be held on 1 July 2010 “on the court’s motion to dismiss for lack of prosecution[.]” Plaintiff did not respond to the “Notice of Lack of Prosecution,” and the Florida court dismissed Plaintiff’s Florida action for lack of prosecution by order entered 15 July 2010. Plaintiff did not visit E.R.Q. between the filing and dismissal of the 2009 Florida action.

In uncontested findings of fact from the Bickett Order, the trial court found as fact that “[in] October of 2008 [] Plaintiff visited with [E.R.Q.] in the state of North Carolina. After this visitation, [] Plaintiff stopped visiting with [E.R.Q.],” and that “during the years 2009 and 2010 [] Plaintiff had no physical contact with [E.R.Q.]” even though “Plaintiff had the ability to visit with [E.R.Q.] during this period of time.” Plaintiff testified as follows concerning this period:

Q Isn’t it true that for a lengthy period of time for more than a year back in about 2010, 2011 you didn’t have any contact with your daughter at all?

A No, that’s not true. *I tried to call my daughter several times.*

Q What’s the longest time you’ve went without seeing or talking to your daughter?

A Seeing her has always been longer. *I think* there were a couple of years where I didn’t see her.

Q Do you remember when those years were?

A 2008 – well, no, I think – I believe I saw her in 2008. I think maybe 2009 – I saw her in 2010, didn’t I, or – I think

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it was 2009 and 2010 was the years that I didn't see my daughter. (Emphasis added).

Plaintiff met Jeff Woolf ("Woolf") in late 2010, and moved to New York in April 2011 to live with him. Plaintiff's May 2011 visit with E.R.Q. appears to have occurred by happenstance. Plaintiff was in Charlotte for reasons unrelated to E.R.Q., so she called Defendant and asked if she could come visit E.R.Q. Defendant agreed, Plaintiff took a train from Charlotte to Salisbury, and Defendant picked her up. Defendant testified that Plaintiff visited with E.R.Q. "for a few hours" then returned to Charlotte by train. Plaintiff's description of this visit was that it was "short, but it was fine."

Plaintiff and Woolf were married in New York in January 2012, and Woolf apparently paid for Defendant and E.R.Q. to attend. Plaintiff visited North Carolina to see E.R.Q. again in 2012, at some time close to E.R.Q.'s July birthday. In the approximately four-year period between June 2008 and the summer of 2012, Plaintiff had seen her daughter only four times: three times in North Carolina, and once in New York. For a brief period in 2011 and early 2012, it appeared that Plaintiff and Defendant were getting along reasonably well, and Plaintiff was maintaining regular phone contact with E.R.Q. However, email exchanges between Plaintiff and Defendant show that by at least May 2012 relations had become seriously strained. The strain in the relationship between Plaintiff and Defendant was likely caused or exacerbated by the fact that in May 2012 Plaintiff told Defendant that Plaintiff was going to regain custody of E.R.Q., move her to Texas to live with Plaintiff and Woolf, and that Defendant could not prevent that from happening.¹

Defendant, who had naturally developed a very close bond with E.R.Q., was opposed to Plaintiff's plan. E.R.Q. was seven years old at this time, and Plaintiff had not been a consistent or reliable part of E.R.Q.'s life since Plaintiff had moved out of the house and left E.R.Q. in Defendant's care when E.R.Q. was one year old. Plaintiff recounted the 22 May 2012 phone conversation with Defendant concerning Plaintiff's desire for custody as follows:

And [Woolf and I] actually moved into a two bedroom apartment, and we knew that we were moving into a two-bedroom apartment. And I had reached out to [Defendant], and it was the summer. And I had said to her, "You know,

1. At this time, Plaintiff and Woolf were living in Texas due to Woolf's job. By the time of the Bickett Order, Plaintiff and Woolf had moved to Northern Virginia.

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we're setting things up for [E.R.Q.] to come live with us, and I think it would be a great transition if [E.R.Q.] would stay with you the majority of the summer, then come up the month before schools starts, and that way we could get her into some programs in the area and get her into some friends and introduce her to the school and things like that, and then we can work on visitation." And I believe [Defendant's] response was something like over her dead body would [E.R.Q.] ever live with me.

Plaintiff emailed Defendant later that same day, stating:

I want you to know that I love the both of you very much and that I hope that you will be able to take the next month and a half to two months to help [E.R.Q.] get ready for the move. I think that there are some things that we need to be on the same page about. But before we get started, there is something we need to address. You keep saying that you have custody of [E.R.Q.]. Back in 2006, I signed temporary custody. I didn't give up my rights. It was for a specific determined amount of time that I can revoke at any time, and it was never permanent. I really hope that you can take the time with [E.R.Q.] to talk to her about the move and all the great things about it such as soccer and getting to decorate a new room. I want you to have a relationship with your granddaughter. With this move to Texas, [E.R.Q.] will be in a great school district. She will be involved in all the things she loves like soccer and playing the violin. I would really like it if you could talk to her about a couple of things that would help her with the move such as looking forward to visits with you, camp, a new school, and new friends and a whole new place to discover and make her own. Just like you asked me not to speak to [E.R.Q.] about this and I said I wouldn't without speaking to you first, I expect as you guys have your conversations she is going to have some questions for me, and that is when I will talk to her about it.

B. Procedural History for the Appeals in COA17-675

Plaintiff filed a "Notice of Registration of Foreign Child Custody Order" with the Clerk of Court, Rowan County, on 25 October 2012, for the purpose of ensuring that the Florida Order could be enforced by the Rowan County district court (the "trial court"). N.C. Gen. Stat. § 50A-305

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(2017). Plaintiff filed a “Motion in the Cause for Modification of a Prior Order” (“Plaintiff’s Motion”) on 15 November 2012, initiating this action (“Plaintiff’s Action”). Plaintiff’s Motion requested that the trial court modify the Florida Order pursuant to the provisions of the “Uniform Child-Custody Jurisdiction and Enforcement Act” (“UCCJEA”) and N.C. Gen. Stat. § 50-13.7 (2017), which allows “upon [the North Carolina court] gaining jurisdiction, and a showing of changed circumstances, ent[ry of] a new order for custody which modifies or supersedes” an order originally entered in another state. N.C.G.S. § 50-13.7(b).

Defendant filed her responsive pleading to Plaintiff’s Motion, Defendant’s “Motion to Dismiss and for Permanent Custody,” on 8 January 2013. In this motion, Defendant alleged in part:

9. . . . [D]efendant took care of [E.R.Q.] in the evening and Plaintiff put her in day care and stayed out and partied all night. At some point she just stopped coming home. By January 2006 Plaintiff had abandoned child with Defendant and “took off.” . . .

10. Defendant and [E.R.Q.] moved to North Carolina June 2008[;] prior to that visitation was very sporadic and Plaintiff never asked to take [E.R.Q.] home, for even a night. . . .

11. Defendant filed for custody in Florida in 2006 after [E.R.Q.] got hurt and she did not know where Plaintiff was living so [Defendant] could obtain emergency medical treatment for [E.R.Q.]. In September 2006, Plaintiff gave [Defendant] a child care power of attorney, but when Plaintiff stopped coming around at all Defendant requested that [Plaintiff] consent to a custody order and she agreed to this. . . . Plaintiff is in arrears \$7,408.06 on child support and Defendant last obtained child support from [Plaintiff] last week for \$90.00. Plaintiff is supposed to be paying \$90.00 per week. From January 2012 till October 2012 [Plaintiff] paid nothing.

12. Defendant and [E.R.Q.] moved to NC in June 2008 and Plaintiff was supposed to come with them; however [Plaintiff] never showed up because she decided to move with a boyfriend and his mom to West Virginia. [Plaintiff and her boyfriend] later married and divorced. Plaintiff’s visits since 2008 were sporadic. In October 2008, Defendant paid \$300.00 for airfare so Plaintiff could visit.

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She stayed the weekend and stated she would return for Thanksgiving however never returned. She did not ask to take [E.R.Q.] home with her.

13. Defendant has never denied Plaintiff visitation. [Defendant] has paid for airfare once and even flew with [E.R.Q.] to New York for Plaintiff's wedding [to Plaintiff's] present husband. Defendant did not hear from Plaintiff at all for two and one half years and only received sporadic child support from Plaintiff's tax returns or frequently from unemployment compensation.

14. In May 2011, Plaintiff called from Charlotte and wanted to see [E.R.Q.] [] Defendant agreed. [Plaintiff] took the train from Charlotte[,] stayed 3 hours[, and] said she had moved to NYC. [Plaintiff] did not ask to stay and went back to Charlotte. [E.R.Q.] asked her to stay and [Plaintiff] was invited and did not stay. [Plaintiff and E.R.Q.] started talking more and Defendant started call[ing] every weekend and was pretty consistent. In November 2011, [] Defendant asked Plaintiff to come for Christmas and [Plaintiff] did [and] she stayed 3 days, then Plaintiff invited Defendant and [E.R.Q.] to NYC to her wedding in January 2012. . . . The parties had a good time but they only got to see Plaintiff for small intervals over the weekend.

15. Plaintiff and [Woolf] moved to Texas in May . . . of 2012 and Plaintiff sent an email that they were moving to Texas and said "we are taking [E.R.Q.] with us and you need to take the next 4 to 6 weeks to prepare her." [] Plaintiff also told [Defendant] that the Florida Order was temporary, that [Plaintiff] could revoke it at any time and that Defendant had violated the [Florida] Order when she moved. Plaintiff also told Defendant that "unless [Defendant] cooperated, that she would never see [E.R.Q.] again." By November 2012, the pending motion was filed.

. . . .

18. Defendant is a fit and proper person to continue to have sole care custody and control of [E.R.Q.] in that:

- a. [E.R.Q.] is now seven years old and has never lived with anyone else other than [Defendant] and that this is the status quo for [E.R.Q.]

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b. [] Defendant is highly educated and gainfully employed in the Cabarrus County School System as a Resource and Inclusion teacher for Disabled and Special Needs Children with a BS in Special Education. [E.R.Q.]’s condition is causing some learning issues and she is especially qualified to care for [E.R.Q.]

c. [] Defendant has for the past seven years successfully cared, support and loved [E.R.Q.] with scant help or contact with the Plaintiff or the biological father, keeping a roof over her head, food in her stomach and dealing with a dangerous medical condition. [E.R.Q.] is happy, relatively healthy other than [what] has been stated and well-adjusted and making excellent progress in school.

d. That a move at the age of seven years old to a mother that she does not really even know would likely be traumatic to [E.R.Q.] and not be in her best interests.

Defendant requested, *inter alia*, that the trial court award Defendant permanent custody of E.R.Q., and grant Plaintiff supervised visitation with E.R.Q.

Plaintiff and Defendant entered into an agreement, which was then entered by the trial court as a “Temporary Consent Order,” on 1 May 2013. This order determined that “it [wa]s in the best interests of [E.R.Q.], pending further hearing in the matter, that Defendant [] maintain primary legal and physical custody of [E.R.Q.]” The order further granted Plaintiff rights of visitation, information sharing, and contact that were not provided for in the Florida Order. Although the May 2013 order did not grant Plaintiff the right to overnight visits with E.R.Q., Defendant apparently independently consented to allow E.R.Q. to visit Plaintiff in Virginia in October of 2014. This 2014 visit was the first time E.R.Q. had an overnight visit with Plaintiff without Defendant’s supervision in over six years. A temporary order was entered on 5 November 2014 officially granting Plaintiff multi-day unsupervised visitation with E.R.Q., on specific dates, at Plaintiff’s home in Virginia .

The hearing on Plaintiff’s motion to modify the Florida Order commenced on 3 March 2015, Judge Bickett presiding, continued over ten non-consecutive days until 16 July 2015, and included the testimony of many witnesses. At the end of that hearing, Judge Bickett expressed his concern about the apparent animus between Plaintiff and Defendant, and between their counsel. The following exchange occurred between

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Judge Bickett and Plaintiff's attorney concerning how Plaintiff had argued her case:

BY THE COURT: I mean, you and [Plaintiff] . . . have filed a motion to register the [Florida Order] and ask that it be modified based upon substantial change of circumstances. And now you're here saying, well, best interest controls and substantial change of circumstances doesn't control.

BY MR. CAMERON: Well, I don't think I've necessarily . . . said that. I think there has been a substantial change in circumstances affecting the welfare of the minor child. And I think . . . coupled with that, the best interests are that she needs to be with [Plaintiff].

Judge Bickett stated:

I have no clue as to what I'm going to do still. I'm going to have to go back and read my notes and – I mean, I do know that you – that with your permission I talked to [E.R.Q.] in chambers and she expressed a preference as she wants to keep things the way they are. And I do know the suicide scares me to death. I mean, and you all presented absolutely minimal evidence as to that and that should have been one of the most important aspects of this case is what's going to happen to her if I move her. I mean, and you all just sort of, "Oh, no. It's no big deal there." It scares me to death.

Judge Bickett decided to continue the matter until 30 July 2015. A proceeding was held on 30 July 2015. In this hearing, Judge Bickett recounted some of the evidence before him, and discussed his concerns that, despite the lengthy trial, the parties had failed to focus on the relevant issues — change of circumstances and best interest of E.R.Q.:

[F]or me to modify [the Florida Order], there has to be a material and substantial change of circumstances affecting the welfare of [E.R.Q.]. And you have to show that it's in the best interest of [E.R.Q.]. There's been marginal evidence, at best, on affecting the welfare of the child. And there's been less evidence on best interest. I mean, this has all been about "what is best for me," not what is best for this young child. However, and [Defendant's attorney] Mr. Paris's argument that this is the second motion with basically the same allegations – I've got a new husband,

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I've got a new job, and I'm stable – I am going to find that there is substantial change of circumstances affecting the welfare of the child. It concerns me deeply that – as I said before, that this young lady came in and testified that she liked being with [Defendant] and that there is evidence of suicidal ideation or some type of psychological problem that you all just didn't bother to think should be a part of this trial, to the extent, I think the best interest is the most important portion of this trial, and you all just sort of – even though you took – this is probably one of the longest trials we've had in this county in the last ten years I've been a judge – you just have ignored best interest. So I'm going to do a temporary order. I'm going to make a finding that this is a high-conflict case and that both parents – both [Plaintiff] and [Defendant] have the means to pay for a parenting coordinator. I'm going to appoint Mary Blanton as a parenting coordinator. . . . I think [E.R.Q.'s] relationship with [Plaintiff] needs to be repaired, and I think I would like nothing better [than] to give custody back to [Plaintiff]. But, ma'am [Plaintiff], Mr. Cameron [Plaintiff's attorney] argued that I should treat this as a juvenile case. If this was a neglect and abuse case, I would have terminated your parental rights eight years ago, or seven years ago. Because the key in that court is permanency. The child has to have a permanent plan. [Y]ou do one year of trying to repair things and get the relationship back with the mother, and if that doesn't work out, then you terminate rights and give the child to a parent or a person that will give the child some type of stability and permanency. And the only permanency [E.R.Q.] has had is with [Defendant]. Now, it concerns me that you all do not like each other, or you all are not getting along. I don't know that I can fix that, but we need to look at what's best for your daughter, and your granddaughter. And I don't – I think pulling her out of [Defendant]'s house when she expressed a preference, and when there's psychological issues that I don't know what they are. I do know that a ten-year-old, if you force her to do something, is going to do something drastic to do whatever she wants to do. And this young lady is a very smart young lady. I just don't want her to do something bad. I don't have confidence that you all can work it out between yourself[ves] because you

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haven't done that because of the animosity that you have. But I do feel confident that we can do something, if you want your relationship repaired, to repair it. And then if you get it repaired, then I can look at best interest, and if – it may be in her best interest that she go back to you [Plaintiff]. But I don't know that now because you all – because of the evidence that's been presented.

Judge Bickett entered his first order in this matter on 30 July 2015, the same day as the proceeding. This temporary order was limited to visitation, stated that the “merits of this case are still pending, with the next hearing date to be scheduled in February or March, 2016[,]” and further stated that the order was “entered without any prejudice to either party.” On 24 February 2016 Judge Bickett entered a second order based on the 30 July 2015 proceeding, in which he made findings and conclusions expressing the same concerns he had discussed at the proceeding, ruled that a parenting coordinator should be appointed, granted Plaintiff more access to E.R.Q., and left the matter open for further action. Judge Bickett made no conclusion in this order that there had been any change in circumstances affecting the welfare of E.R.Q.

The next hearing was conducted on the same day the 24 February 2016 order was entered. In this 24 February 2016 hearing, Plaintiff testified that she would like “the judge to allow [E.R.Q.] to come live with [Plaintiff] as soon as today[.]” Over Plaintiff's objection, E.R.Q., then approaching eleven years old, testified. E.R.Q. was clearly nervous initially, and Plaintiff and Defendant agreed to leave the courtroom so E.R.Q. would not have to answer questions in front of them. Judge Bickett attempted to calm E.R.Q., and let her know that her testimony was not going to determine with whom she was going to live. Judge Bickett told E.R.Q. he was “just trying to figure out what is best for you, and I'm trying to figure out a way for you to have a better relationship with [Plaintiff]. But . . . I want to find out just what you want. Okay?” E.R.Q. responded: “I want to live in North Carolina.” E.R.Q. explained a number of the reasons she preferred to remain in North Carolina. When asked about her visits with Plaintiff, E.R.Q. testified that the visits went “[g]ood. I don't know why, but I always end up angry at the end.” E.R.Q. testified that she would be happy to have more time to visit Plaintiff over the summer, but when Judge Bickett inquired: “Tell me, you used to not have a relationship with your mom. Do you like having one?” E.R.Q. responded: “Yes. But I think she pushed it too far when she put it in court.” E.R.Q. testified that the reason she does not talk with Plaintiff on the phone sometimes is that she has a lot of schoolwork and

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is otherwise busy, or because she has fallen asleep. She testified that Defendant never prevents her from talking to Plaintiff.

E.R.Q. testified that she is sometimes sad to leave Virginia because she has “such a good time” in Virginia. She stated that Plaintiff and Woolf “buy a lot of stuff for” her, and that her bicycle in North Carolina was broken. However, when asked if she was “getting as much time with [Plaintiff] as you want for right now,” E.R.Q. answered: “Yes.” When asked how her life was going at Defendant’s house, E.R.Q. answered: “Good. I love it there. The only thing is that Henry [her dog] is wild. I love that dog though.” When asked if it seemed that Defendant had less money than Plaintiff, E.R.Q. answered: “I’ve never cared or thought of that.” E.R.Q. testified that she gave Defendant a necklace that was “a diamond crusted heart [that] says ‘Mom[,]’ ” which she bought with money she earned and quarters she finds “laying on the ground my mom [Defendant] leaves there on purpose.” E.R.Q. testified that she calls both Defendant and Plaintiff “mom,” and that she was “lucky to have two moms.” She reflected on having two moms, saying: “Oh, it’s been the same since – when [Kresge] was around, and I didn’t even know [Plaintiff], I had two moms. [Kresge] left, then I get [Plaintiff]. Two moms.”² When asked if she would have any problems if the trial court decided she would have to live with Plaintiff and go to school in Virginia, E.R.Q. answered: “It would take me about three years to adjust to that, because that’s how long it took me to make all my friends from Salisbury.” E.R.Q. explained that she believed “[Defendant] and [Plaintiff] need to communicate more.” Finally, E.R.Q. testified: “I love both my mothers equally.”

Judge Bickett expressed concerns over “nuances to family law that you all haven’t really argued here that really worried me to death on this case.” Recognizing that, pursuant to N.C.G.S. § 50-13.7, he first had to find a change of circumstances affecting the welfare of E.R.Q., and only then consider the best interests of E.R.Q., Judge Bickett asked: “If I find that hasn’t happened^[3] then it reverts – then I dismiss your action. If I do that, what does it do to the temporary orders that are entered?” Defendant’s attorney stated that he thought all the visitation orders would be “gone” if the trial court denied Plaintiff’s underlying motion to modify custody pursuant to N.C.G.S. § 50-13.7. Judge Bickett responded:

2. The relationship between Defendant and Kresge ended sometime before Plaintiff filed this action, and Kresge moved out of the house.

3. That the requirements for modification pursuant to N.C.G.S. § 50-13.7 had not been met.

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I think they're gone, too. I mean, you all aren't – aren't conversing. I mean, it's obvious [E.R.Q.] expressed a preference. . . . From 2005 to 2010 . . . [Plaintiff] was pretty much nonexistent. As I said from the last time, there are at least three grounds under North Carolina law where I could terminate [Plaintiff's parental] rights, and I would have terminated her rights if it were a neglect case. It's also, you know, since 2012 when she filed this lawsuit she's been totally in. I mean, she's really been doing what she's supposed to do. But a child needs permanency. They need to have the same thing from day to day and [Plaintiff] hasn't done that. I mean, she's gotten – she's very involved now. I'm going to take it under advisement. I need to figure out how to structure an order that is in [E.R.Q.'s] best interest. I mean, I could easily say your motion's denied and then I don't know where we're left. I don't think that it is in [E.R.Q.'s] best interest that she not have a strong relationship with her mother, and that's what I was trying to do. *That's why I tried to do this order to get you more and more time with her so to develop a strong relationship and to do something over the summer where your client had extended time with her. But obviously you []all didn't want that.* So I'll make a decision and I'll figure out how I can do my order. But I need to think about it and reread some of the North Carolina law to figure out how I can structure an order that will help her in the best interest. And I'm not exactly sure based upon the pleadings and what you all are asking for how I can do that. But I'll figure it out. (Emphasis added).

From Judge Bickett's remarks at the hearing, it appears to this Court that his opinion at that time was that Plaintiff had not met her burden under N.C.G.S. § 50-13.7, but that he did not believe E.R.Q.'s best interest would be met if the result of denial of Plaintiff's motion to modify custody might lead to Plaintiff losing all visitation rights, so he was going to review the relevant law and try and find a way to preserve visitation between Plaintiff and E.R.Q.

Plaintiff filed a motion in the cause on 22 April 2016 seeking to be allowed to present additional evidence to the trial court, and seeking a show cause order against Defendant for violating terms of the 1 May 2013 temporary consent order. A hearing was conducted on 12 May 2016, but Plaintiff's motions were not considered because Defendant's attorney informed the trial court that he no longer had a working

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relationship with Defendant, and Judge Bickett continued the matters because he would not proceed on Plaintiff's motion's if Defendant did not have appropriate representation. The following day, 13 May 2016, Plaintiff filed a "Motion for Mistrial and Motion for Recusal," arguing, *inter alia*, that Judge Bickett demonstrated bias against Plaintiff during the prior hearings and had not acted in a timely fashion to the prejudice of Plaintiff. Plaintiff also argued that, during the 24 February 2016 hearing, "immediately after issuing a written order that stated that Plaintiff had shown a substantial change of circumstances . . . Judge Bickett announced that there had been no substantial change of circumstances." Review of both the 24 February 2016 order and the 24 February 2016 hearing show that Judge Bickett did not reach a conclusion on the issue of substantial change of circumstances affecting the welfare of E.R.Q. in either the order or the hearing. Plaintiff also stated in her motion that she was filing a complaint against Judge Bickett with the North Carolina Judicial Standards Commission. Plaintiff requested that a mistrial be declared in the matter, and that "a new judge be appointed to hear the merits of the case[.]"

Judge Bickett entered the custody order from which Plaintiff currently appeals – the Bickett Order – on 16 May 2016. The Bickett Order concluded that Plaintiff had "failed to meet her burden to show that there has been a substantial and material change of circumstances affecting the welfare of" E.R.Q., and that Plaintiff had "acted inconsistently with her constitutionally protected status to parent her child[.]" Judge Bickett denied Plaintiff's Motion to modify the Florida Order, and Plaintiff's Action was dismissed.

Plaintiff filed a "Motion for a New Trial" pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 (2017), on 23 May 2016. Plaintiff filed an affidavit from Florida attorney Craig A. Boudreau ("Boudreau") on 22 August 2016, in which Boudreau cited to provisions of Florida law – including Florida's UCCJEA statutes – that Boudreau suggested demonstrated jurisdiction had remained with the Florida court. Boudreau further contended a Florida statute, not N.C.G.S. § 50-13.7, should have determined the proper standard to apply when considering whether to modify the Florida Order. The Boudreau affidavit appears to be the first record evidence challenging North Carolina's jurisdiction to act in Plaintiff's Action, and the first indication that Plaintiff was going to argue that Florida law controlled the outcome in Plaintiff's Action. Plaintiff's new argument was that the sole relief Plaintiff had requested in this matter⁴ – modification

4. By filing her 15 November 2012 "Motion in the Cause for Modification of a Prior Order," which initiated the present action, and by arguing, exclusively, over years of

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of the Florida Order based upon a change of circumstances as required by N.C.G.S. § 50-13.7 – was not justified under the law.

A new judge, Judge James Randolph (“Judge Randolph”), became involved in the case by at least 24 August 2016, as the record demonstrates that he presided over a hearing on that date. Judge Bickett recused himself from the matter by order entered 6 September 2016. If the 24 August 2016 hearing was recorded, it has not been included in the record, though we note that this hearing occurred after Plaintiff had filed her Rule 59 motion and the Boudreau affidavit, and therefore subsequent to the time Plaintiff alleges that she became aware that North Carolina had never obtained jurisdiction in this matter. Judge Randolph entered a temporary custody order on 7 September 2016, based upon the 24 August 2016 hearing, in which he concluded that the trial court had subject matter jurisdiction, North Carolina was E.R.Q.’s home state, and in which he ordered certain specific visitation provisions. This order did not acknowledge any jurisdictional or choice of law concerns raised by Plaintiff.

Plaintiff’s Rule 59 motion for a new trial was heard on 7 September and 19 October 2016.⁵ The order from which Defendant appeals was entered by Judge Randolph on 17 November 2016 (the “Randolph Order”). In the Randolph Order, the trial court addressed the new arguments raised by Plaintiff involving jurisdiction and Florida law. Judge Randolph ruled that the trial court had never obtained subject matter jurisdiction pursuant to UCCJEA requirements, and therefore, effectively, that all prior orders entered by the trial court were void. However, the trial court included conclusions of law unrelated to subject matter jurisdiction, namely: “The [trial court] finds that there exist sufficient grounds under North Carolina Rules of Civil Procedure Rule 59 to warrant a new trial, if this [c]ourt obtains subject matter jurisdiction. This [c]ourt should give Full Faith and Credit to Florida law.” Based upon its findings and conclusions, the trial court ordered:

1. Plaintiff’s Motion for New Trial is granted, if Florida releases subject matter jurisdiction to North Carolina.
2. [That Judge Randolph would contact the appropriate judge in Florida to seek release of jurisdiction.]

litigation and many days of hearings, that Plaintiff had met the requirements of N.C.G.S. § 50-13.7 for modification of the Florida Order.

5. Only the transcript for 7 September 2016 appears in the record.

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. . . .

4. As the [Florida Order] originated in Palm Beach County, Florida, Florida law applies to the interpretation of said order.

Following entry of the Randolph Order, the trial court entered a “Formal Order from Consent Judgment/Order” on 13 December 2016, in which it modified a visitation provision of the 7 September 2016 temporary custody order. Defendant filed notice of appeal from the Randolph Order on 16 December 2016. Plaintiff filed notice of appeal from the Bickett Order on 19 December 2016.

C. Procedural History for Appeal in COA17-1344

Plaintiff filed a “Verified Motion in the Cause to Terminate Order for Temporary Custody” on 4 January 2017 (the “Verified Motion”), under the same case number assigned to Plaintiff’s prior action. In that motion, Plaintiff requested that the trial court make a determination that Plaintiff was “a fit parent and able to assume all parental responsibilities” for E.R.Q. and thereupon order the Florida Order “be terminated pursuant to Ch. 751.05(6), Florida Statutes.” The Florida court entered an order purporting to “transfer” jurisdiction to North Carolina on 21 February 2017. A hearing was conducted on the Verified Motion on 14 March 2017. The trial court entered a “Child Custody Order” on 28 March 2017 (the “2017 Order”) in which it found that the “State of Florida . . . transferred jurisdiction of this child custody matter to the State of North Carolina” on 21 February 2017. The trial court, applying Florida law, concluded that Plaintiff was “a fit parent” and “a proper person to assume legal and physical custody of” E.R.Q. Based upon these findings, the trial court “ordered, adjudged and decreed” that the Florida Order was terminated; that the 2017 Order “supersedes and vacates all other North Carolina Orders in this court file[;]” that “Plaintiff shall have legal and physical custody of” E.R.Q., and that E.R.Q. “shall transition to live with Plaintiff [] in Herndon, Virginia” on 2 April 2017. No provisions for visitation between E.R.Q. and Defendant were included in the 2017 Order. Defendant appealed the 2017 Order on 27 April 2017.

II. Appeal in COA17-675*A. Plaintiff’s Appeal***1. Appellate Jurisdiction**

[1] As an initial matter, we must determine whether this Court has jurisdiction to consider Plaintiff’s appeal. Plaintiff’s notice of appeal from the

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16 May 2016 Bickett Order was filed on 19 December 2016, well beyond the thirty-day requirement set forth in Rule 3(c)(1). N.C. R. App. P. 3(c)(1). Therefore, the timeliness of Plaintiff's appeal hinges upon whether Plaintiff's 23 May 2016 "Motion for New Trial" pursuant to Rule 59 served to toll the thirty-day period as allowed by Rule 3(c)(3). *See Battle v. Sabates*, 198 N.C. App. 407, 413, 681 S.E.2d 788, 793 (2009). In *Smith v. Johnson*, 125 N.C. App. 603, 481 S.E.2d 415 (1997), this Court dismissed the defendants' appeal based upon the following reasoning:

To qualify as a Rule 59 motion within the meaning of Rule 3 of the Rules of Appellate Procedure, the motion must "state the grounds therefor" and the grounds stated must be among those listed in Rule 59(a). N.C.G.S. § 1A-1, Rule 7(b)(1) (1990); N.C.G.S. § 1A-1, Rule 59(a) (1990); *see* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil* 2d § 2811, at 132 (1995) (motion that "does not sufficiently state grounds has been treated as a nullity and ineffective" for extending time for taking appeal). The mere recitation of the rule number relied upon by the movant is not a statement of the grounds within the meaning of Rule 7(b)(1). The motion, to satisfy the requirements of Rule 7(b)(1), must supply *information* revealing the basis of the motion.

In this case the defendants indicate in the motion that they rely on Rule 59(a)(2) & (7) as the bases of their motion. There are, however, *no allegations in the motion revealing any "[m]isconduct of the jury or prevailing party," N.C.G.S. § 1A-1, Rule 59(a)(2), or an "[i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law."* N.C.G.S. § 1A-1, Rule 59(a)(7).

Smith, 125 N.C. App. at 606, 481 S.E.2d at 417 (citations omitted) (emphasis added); *see also Meehan v. Cable*, 135 N.C. App. 715, 721, 523 S.E.2d 419, 423 (1999).

Plaintiff's purported Rule 59 motion included bare allegations of errors pursuant to Rule 59(a), but did not allege any *actual conduct* that would support any of those bare allegations of error. For example, Plaintiff's motion alleged: "Plaintiff moves pursuant to Rule 59 . . . for a new trial on Plaintiff's Motion to Change Custody because . . . [of] insufficiency of evidence to justify the verdict, the verdict is contrary to law, errors in law occurring at trial and objected to by [] Plaintiff[.]" However, Plaintiff's purported Rule 59 motion included "no allegations

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in the motion revealing . . . an ‘[i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law[,]’ ” or any error of law objected to by Plaintiff. *Smith*, 125 N.C. App. at 606, 481 S.E.2d at 417 (citation omitted). Plaintiff’s motion, by simply reciting statutory language, included nothing more than bald allegations that certain statutory grounds existed – specifically those included in Rule 59(a)(1), (3), (4), (7), and (8). Plaintiff’s mere recitation of grounds laid out in Rule 59(a) was insufficient to “qualify [her motion] as a Rule 59 motion within the meaning of Rule 3 of the Rules of Appellate Procedure[.]” *Id.* (citations omitted). To the extent the Boudreau affidavit included allegations relevant to Plaintiff’s Rule 59 motion, those allegations were not part of Plaintiff’s Rule 59 motion because the affidavit was not filed until 22 August 2016, and was not incorporated into Plaintiff’s motion. N.C.G.S. § 1A-1, Rule 59(c).

Because Plaintiff’s 23 May 2016 motion did not qualify as a motion for a new trial pursuant to Rule 59, its filing did not toll the time Plaintiff had to file her notice of appeal from the 16 May 2016 Bickett Order and, therefore, Plaintiff’s 19 December 2016 Notice of Appeal was not timely filed. N.C. R. App. P. 3(a)(1); *Smith*, 125 N.C. App. at 606, 481 S.E.2d at 417. Absent a timely filed notice of appeal, this Court is without jurisdiction to consider Plaintiff’s appeal. *Id.*

Although a lack of subject matter jurisdiction normally precludes an appellate court from considering the merits of an appeal, there is an exception when the lack of jurisdiction is based on failure to timely file a notice of appeal. “Our appellate courts have explained on multiple occasions that ‘[n]o appeal lies from an order of the trial court dismissing an appeal for failure to perfect it within apt time, the proper remedy to obtain review in such case being by petition for writ of *certiorari*.’ ” *Am. Mech., Inc. v. Bostic*, 245 N.C. App. 133, 137, 782 S.E.2d 344, 346, *disc. review denied*, __ N.C. __, 784 S.E.2d 472 (2016) (citations omitted). Plaintiff has not petitioned this Court for review pursuant to writ of *certiorari*. However, we chose to treat Plaintiff’s appeal as a petition for writ of *certiorari*, and address her arguments. *See Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997).

2. Plaintiff’s Arguments

Plaintiff argues three issues on appeal from the Bickett Order: (1) that the trial court “erred by entering the [Bickett] Order as the [trial] court lacked subject matter jurisdiction;” (2) that the trial court “erred by applying North Carolina law, rather than Florida law in its custody order;” and (3) that the trial court “abused [its] discretion by finding and

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concluding as a matter of law that Plaintiff [] had ‘engaged in conduct inconsistent with her constitutionally protected status of a parent.’” We address each argument in turn, and affirm the Bickett Order.

a. Subject Matter Jurisdiction

[2] Plaintiff first argues that Judge Bickett lacked jurisdiction to enter the Bickett Order. We disagree.

The UCCJEA and the Parental Kidnapping Prevention Act (“PKPA”) control whether courts of this State have jurisdiction to modify custody determinations entered by courts of another state. *See* N.C. Gen. Stat. §§ 50A-201 to 210 (2017); 28 U.S.C.A. § 1738A. It is the continuing duty of this Court to insure, even *sua sponte*, that the trial court had subject matter jurisdiction in every action it took. Although Plaintiff makes no argument concerning the PKPA, we have determined that the provisions of the PKPA were met in the present case. Plaintiff argues, however, that the jurisdictional requirements of the UCCJEA were not met prior to entry of the Bickett Order.

Although Plaintiff bases her argument on a different statute, the requirements for *obtaining* jurisdiction to modify a custody order entered in another state are found in N.C.G.S. § 50A-203 – “Jurisdiction to modify determination”:

Except as otherwise provided in G.S. 50A-204, a court of this State may not modify a child-custody determination made by a court of another state *unless* a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2) *and*:

- (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; *or*
- (2) *A court of this State or a court of the other state determines that the child, the child’s parents, and any person acting as a parent do not presently reside in the other state.*

N.C.G.S. § 50A-203 (emphasis added).

Pursuant to N.C.G.S. § 50A-201, a court of this State has jurisdiction to enter an initial custody determination if “[t]his State is the home state of the child on the date of the commencement of the proceeding[.]” N.C.G.S. § 50A-201(a)(1). In a 1 May 2013 “Temporary Consent Order,” the

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trial court found and concluded, that “*North Carolina is the home state of [E.R.Q.] . . . and none of the parties to this action presently reside in the state of the Prior Order [Florida].*” (Emphasis added). Plaintiff does not dispute either of these findings, and they are supported by the facts in this case. It is uncontested that North Carolina is the “home state” of E.R.Q. and, therefore, that the trial court had “jurisdiction to make an initial determination under G.S. 50A-201(a)(1)[.]” N.C.G.S. § 50A-203. The trial court correctly determined that none of the relevant persons – E.R.Q., Plaintiff, Defendant, or Carter – were residents of Florida at any time relevant to our jurisdictional analysis, which satisfies N.C.G.S. § 50A-203(2). Because both conditions for modification jurisdiction pursuant to N.C.G.S. § 50A-203(2) were met, the trial court had jurisdiction to consider Plaintiff’s Action to modify the Florida Order, and to enter the various visitation and other orders entered in relation to the issue of E.R.Q.’s custody, including the Bickett Order. *In re J.H.*, 244 N.C. App. 255, ___, 780 S.E.2d 228, 235–38 (2015).

Plaintiff, however, argues that the Florida court had “exclusive, continuing jurisdiction” (“ECJ”) pursuant to N.C.G.S. § 50A-202 until the Florida court released jurisdiction to North Carolina. Plaintiff is correct that a court with ECJ over a custody matter is the only court with jurisdiction to act in that matter.⁶ *See, e.g., Matter of T.E.N.*, __ N.C. App. ___, 798 S.E.2d 792 (2017). However, if the requirements for modification of a custody determination from another state pursuant to N.C.G.S. § 50A-203 are met, ECJ for that state will have ceased pursuant to the terms of N.C.G.S. § 50A-202. Relevant to this appeal, Florida lost ECJ because the trial court in North Carolina “determine[d] that [E.R.Q.], [E.R.Q.]’s parents, and [Defendant] d[id] not presently reside in [Florida]” at any time relevant to Plaintiff’s Action. N.C.G.S. § 50A-202(a)(2). *Matter of T.E.N.*, __ N.C. App. at ___, 798 S.E.2d at 794; *In re E.J.*, 225 N.C. App. 333, 336, 738 S.E.2d 204, 206 (2013); *In re N.R.M., T.F.M.*, 165 N.C. App. 294, 298–301, 598 S.E.2d 147, 149–51 (2004).

Plaintiff also argues that Defendant’s relocation to North Carolina violated a Florida statute and thereby caused jurisdiction to remain with the Florida court. When Defendant moved to North Carolina in July of 2008, violation of the statute in question, Fla. Stat. § 61.13001(3) (f) (2007), “subject[ed] the party in violation thereof to contempt and other proceedings to compel the return of the child[.]” *Id.*⁷ Nothing in

6. With the exception of temporary emergency jurisdiction, which may be exercised by a court without ECJ when a child’s welfare requires immediate action. N.C.G.S. § 50A-204.

7. This portion of the statute has since been amended.

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the Florida statute itself served to deprive the trial court of jurisdiction in this case. The provisions of the UCCJEA relevant to Plaintiff's argument state:

(a) Except as otherwise provided in G.S. 50A-204 or by other law of this State, if a court of this State has jurisdiction under this Article because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

(1) The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction[.]

N.C.G.S. § 50A-208. Even assuming, *arguendo*, Defendant was a “person seeking to invoke” jurisdiction in North Carolina, and that she engaged in “unjustifiable conduct” by moving with E.R.Q. to North Carolina, Plaintiff clearly acquiesced to the jurisdiction of this State by registering the Florida Order in North Carolina, and by filing her action here. *Id.* None of the orders entered prior to the Randolph Order, including the Bickett Order, were void for lack of subject matter jurisdiction.

b. Choice of Law and Full Faith and Credit

[3] Plaintiff argues that the trial court failed to afford full faith and credit to the Florida Order, and “erred by applying North Carolina law, rather than Florida law in” the Bickett Order. We disagree.

i. *Child Custody Law in North Carolina and Florida*

We first note that in North Carolina, as in Florida, trial courts are given very broad discretion in child custody matters – whether initially or upon a request for modification of a prior custody order – based upon the universal principle that the best interest of the child shall remain paramount. *See Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citations omitted) (“As in most child custody proceedings, a trial court’s principal objective is to measure whether a change in custody will serve to promote the child’s best interests. Therefore, if the trial court does indeed determine that a substantial change in circumstances affects the welfare of the child, it may only modify the existing custody order if it further concludes that a change in custody is in the child’s best interests.”); *Castillo v. Castillo*, 950 So. 2d 527, 528 (Fla. Dist. Ct. App. 2007) (citations omitted) (“The trial court exercises broad discretion in making a child custody determination, and its decision is reviewed for a clear showing of an abuse of discretion. . . . ‘Decisions affecting child custody require a careful consideration of the best interests of the child.’ ”). This Court “has often reiterated that the jurisdiction of the

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court to protect infants is broad, comprehensive and plenary.” *Massey v. Massey*, 121 N.C. App. 263, 268–69, 465 S.E.2d 313, 316 (1996) (citations and quotation marks omitted). “Any judgment entered by consent or otherwise, determining the custody and maintenance of minor children, may be modified by the court at any time changed conditions make a modification right and proper.” *Zande v. Zande*, 3 N.C. App. 149, 153–54, 164 S.E.2d 523, 527 (1968) (citations omitted); *see also In re Marlowe*, 268 N.C. 197, 199, 150 S.E.2d 204, 206 (1966); *Reed v. Reed*, 182 So. 3d 837, 840–41 (Fla. Dist. Ct. App. 2016). Under both North Carolina and Florida law generally, the provisions of a custody order remain susceptible to modification based upon a substantial change of circumstances affecting the welfare of the child and a finding that modification would be in the child’s best interest. N.C. Gen. Stat. § 50-13.7 (2017); Fla. Stat. § 61.13(2)(c) (2017).

However, in both North Carolina and Florida, the burdens for modifying regular custody orders are dependent on whether the order is “temporary” or “final.” *See Simmons v. Arriola*, 160 N.C. App. 671, 674, 586 S.E.2d 809, 811 (2003); *Jones*, 674 So. 2d at 774. Florida, unlike North Carolina, has a special proceeding for granting “temporary” custody of a child to an “extended family member” for the purposes of recognizing “that many minor children in this state live with and are well cared for by members of their extended families” because the “parents of these children have often provided for their care by placing them temporarily with another family member who is better able to care for them.” Fla. Stat. § 751.01(1) (2007) (part of an act (the “Act”) entitled: “Temporary Custody of Minor Children by Extended Family”). Through the Act, parents can relatively easily transfer both legal and physical custody of their children to certain relatives. Fla. Stat. § 751.05 (2007). The Act also provides a simple method for parents to regain full custody of their children – filing the appropriate petition to terminate the custody order and demonstrating to the court that they are “a fit parent,” or demonstrating that all parties to the order consent to return of custody to the parent. Fla. Stat. § 751.05(6). It is through the procedures set forth in the Act that, with the consent of both Plaintiff and Carter, legal and physical custody of E.R.Q. was transferred to Defendant. North Carolina has no legislation similar to the Act.

ii. Failure to Preserve Issues

We first hold that Plaintiff has failed to preserve the issues of full faith and credit or what law controls for appellate review. Plaintiff’s Action was initiated by Plaintiff’s Motion to modify the Florida Order. Plaintiff’s Motion expressly and solely requested the remedy of *modification*

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pursuant to North Carolina law, specifically N.C.G.S. § 50-13.7. During the ensuing three and a half years, which culminated in a ten-day trial, additional hearings, and entry of the Bickett Order, Plaintiff sought modification of the Florida Order pursuant to N.C.G.S. § 50-13.7, and never gave the trial court any indication she believed the matter should be considered pursuant to Florida law. After her motion to modify the Florida Order was denied by the Bickett Order, Plaintiff filed her Rule 59 “Motion for New Trial.”

As discussed above, Plaintiff’s Rule 59 motion was not valid. Nonetheless, Plaintiff purported to request a new trial on the basis of, *inter alia*, the following: “the verdict is contrary to law, [and there were] errors in law occurring at trial and objected [to] by [] Plaintiff[.]” Plaintiff’s language, “errors in law occurring at trial and objected [to] by [] Plaintiff[.]” tracks the language of Rule 59(a)(8).

In order to obtain relief under Rule 59(a)(8), a defendant must show a proper objection at trial to the alleged error of law giving rise to the Rule 59(a)(8) motion. Neither defendant’s post-trial motion nor the remaining record before us shows a proper objection at trial to any of the rulings at issue. Nothing else appearing, from the record before us, defendant failed to preserve his right to pursue a Rule 59(a)(8) motion.

Davis v. Davis, 360 N.C. 518, 522–23, 631 S.E.2d 114, 118 (2006). None of the other Rule 59 grounds for a new trial referenced in Plaintiff’s motion are applicable to Plaintiff’s choice of law argument. The “verdict is contrary to law” language, which tracks part of Rule 59(a)(7), refers to a verdict rendered after a proper proceeding, but that is still in some manner unlawful. *See, e.g., Matter of Will of Leonard*, 71 N.C. App. 714, 718, 323 S.E.2d 377, 380 (1984) (citation omitted) (grant of a new trial was proper based upon unlawful verdict because “[t]he jury cannot find both for the plaintiff and the defendant on the same issue”). Plaintiff’s arguments that the trial court did not give full faith and credit to the Florida Order, and applied the wrong law, were issues of law that Plaintiff was required to object to prior to or during trial. *Davis*, 360 N.C. at 522–23, 631 S.E.2d at 118. Because Plaintiff did not object based upon those issues at trial, those issues were not properly preserved as arguments for Plaintiff’s Rule 59 motion for a new trial, and the trial court erred in considering them. *Id.*; *Barnett v. Security Ins. Co. of Hartford*, 84 N.C. App. 376, 380, 352 S.E.2d 855, 858 (1987).

Absent a proper objection at trial, Plaintiff has also failed to preserve these issues for *appellate* review.

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In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1). Plaintiff did not simply fail to object to the trial court's application of N.C.G.S. § 50-13.7 at trial, she *affirmatively and solely requested* relief pursuant to N.C.G.S. § 50-13.7. Plaintiff may not base an appeal on an alleged error that she invited. *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994) (a party has no right to appeal invited error: "A party may not complain of action which [s]he induced") (citations omitted). This argument is therefore dismissed on these bases as well.

iii. *Merits*

We further hold that the rulings in the Bickett Order gave full faith and credit to the Florida Order and properly applied the law of North Carolina. Plaintiff argues: " 'Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.' U.S. Const. art. IV, § 1." However, the United States Supreme Court has "declined expressly to settle the question" of whether "custody orders [a]re sufficiently 'final' to trigger [the] full faith and credit requirements" of U.S. Const. art. IV, § 1. *Thompson v. Thompson*, 484 U.S. 174, 180, 98 L. Ed. 2d 512 (1988) (citations omitted). The Court in *Thompson* reasoned:

Even if custody orders were subject to full faith and credit requirements, the Full Faith and Credit Clause obliges States only to accord the same force to judgments as would be accorded by the courts of the State in which the judgment was entered. Because courts entering custody orders generally retain the power to modify them, courts in other States were no less entitled to change the terms of custody according to their own views of the child's best interest. For these reasons, a parent who lost a custody battle in one State had an incentive to kidnap the child and move to another State to relitigate the issue. This circumstance contributed to widespread jurisdictional deadlocks . . . , and more importantly, to a national epidemic of parental kidnapping.

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Id. at 180, 98 L. Ed. 2d at 521 (citations omitted). Congress attempted to address this issue by enacting the PKPA, thereby severely limiting the circumstances in which a state could exercise *jurisdiction* to modify a custody order properly entered in another state:

Once a State exercises jurisdiction consistently with the provisions of the [PKPA], no other State may exercise concurrent jurisdiction over the custody dispute, § 1738A(g), even if it would have been empowered to take jurisdiction in the first instance, and all States must accord full faith and credit to the first State's ensuing custody decree.

Id., at 177, 98 L. Ed. 2d at 518-19. The PKPA created a *statutory* requirement that states afford full faith and credit to custody orders initially entered in a different state. This full faith and credit requirement is *not* based upon U.S. Const. art. IV, § 1, the Full Faith and Credit Clause. *Id.*, at 181, 98 L. Ed. 2d at 521 (“[t]he context of the PKPA therefore suggests that the principal problem Congress was seeking to remedy was the inapplicability of full faith and credit requirements to custody determinations”); *In re Craigo*, 266 N.C. 92, 95, 145 S.E.2d 376, 378 (1965) (Full Faith and Credit Clause does not apply to custody orders); *Williams v. Walker*, 185 N.C. App. 393, 400, 648 S.E.2d 536, 541 (2007).

As discussed above, because of the unique nature of child custody determinations, our Supreme Court has recognized that the rules governing regular civil foreign judgments are different than those governing child custody orders. Both Florida law and the terms of the Florida Order allowed modification of the Florida Order by the Florida court – so long as that court retained jurisdiction. The Florida Order awarded custody of E.R.Q. to Defendant conditioned upon the following relevant provisions: (1) Defendant “is awarded temporary physical and legal custody of . . . [E.R.Q.], until the child turns 18 years old or the parents petition for modification of custody under Section 751.05(7), Florida Statutes” and, (2) “**RESERVATIONS:** The [Florida court] retains jurisdiction to enforce or *modify the terms of this final judgment as may, from time to time, become necessary.*” (Emphasis added).

As our Supreme Court held under similar circumstances, since the trial court in North Carolina had *obtained jurisdiction*, it could

consider any change or circumstances that [arose] since the entry of the Florida decree . . . , and [it could] determine what [was] for the best interest of the child and [] award custody accordingly. But, in disposing of the custody of the minor child in controversy, the Florida decree awarding

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her custody to the petitioner is entitled to full faith and credit as to all matters existing when the decree was entered and which were or might have been adjudicated therein. “[W]here a decree . . . fixing the custody of the children . . . is rendered in accordance with the laws of another state by a court of competent jurisdiction, such decree will be given full force and effect in other states as long as the circumstances attending the rendition of the decree remain the same. *The decree has no controlling effect in another state as to the facts and conditions arising subsequent to its rendition.*”

In re Marlowe, 268 N.C. 197, 199–200, 150 S.E.2d 204, 206–07 (1966) (emphasis added);⁸ *Spence v. Durham*, 283 N.C. 671, 683–84, 198 S.E.2d 537, 545 (1973); *Spoon v. Spoon*, 233 N.C. App. 38, 44, 755 S.E.2d 66, 71 (2014). Further, in another case procedurally similar to the present case, our Supreme Court reasoned:

Since this is a case involving modification of a custody order entered with the consent of both parties by a court in California, the controlling statute is N.C.G.S. § 50-13.7. That statute provides in pertinent part:

[W]hen an order for custody of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and a showing of changed circumstances, enter a new order for custody which modifies or supersedes such order for custody.

N.C.G.S. § 50-13.7(b) (1995).

Pulliam v. Smith, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998).⁹ In *Pulliam* our Supreme Court did not look to California law to determine whether modification of the existing California consent custody order was warranted, it applied the standard mandated by N.C.G.S. § 50-13.7(b).

8. The jurisdictional rules set forth in the UCCJEA supersede prior jurisdictional rules. However, the fact that a court with jurisdiction can always modify a custody order, whether from this State or another, upon a showing of substantially changed circumstances and in accordance with the best interests of the child, remains the law of this State.

9. N.C.G.S. § 50-13.7(b) has been amended to clarify that modification is “[s]ubject to the provisions of G.S. 50A-201, 50A-202, and 50A-204” of the UCCJEA.

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It is true that the Florida Order granted custody to Defendant pursuant to a procedure not found in North Carolina, and that the Florida Order provided for modification of its terms by the procedure set forth in Fla. Stat. § 751.05. However, once the trial court in North Carolina obtained jurisdiction, it had the authority to modify the Florida Order; based upon findings of substantial change in circumstances affecting E.R.Q. and that modification would be in E.R.Q.'s best interest. *Pulliam*, 348 N.C. at 624, 501 S.E.2d at 902. Full faith and credit, as well as the UCCJEA, required that the trial court *recognize and enforce* the custody determination made in the Florida Order – that Defendant had legal and physical custody of E.R.Q., and that any attempt to deprive Defendant of custody, absent modification of the Florida Order, would be in derivation of the UCCJEA, but only so long as the Florida Order was not validly modified or vacated.¹⁰ Once the trial court obtained jurisdiction, it could only modify the Florida Order pursuant to N.C.G.S. § 50-13.7(b). This does not mean that the trial court was free to ignore the Florida Order, but the terms and intent of the Florida Order had to be considered based upon the circumstances in existence when that order was entered, and further considered within the context of everything that had transpired after entry of the Florida Order. The trial court has broad discretion with respect to custody matters, and is expected to consider all relevant factors when making any custody determination. Assuming, *arguendo*, Plaintiff's arguments were properly before us, we would reject Plaintiff's arguments concerning jurisdiction, full faith and credit, and application of North Carolina law to Plaintiff's Action, and affirm the trial court's denial of Plaintiff's Motion.

c. Conduct Inconsistent with Protected Status as a Parent

[4] Plaintiff argues that the trial court erred in finding and concluding “by clear cogent and convincing evidence that [] Plaintiff [] acted inconsistently with her constitutionally protected status to parent her child.” We disagree.

“[W]e review [a] conclusion [that the natural parent's conduct was inconsistent with her constitutionally protected right] *de novo*, and determine whether it is supported by ‘clear and convincing evidence.’” *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 502 (2010) (citations omitted).

10. Again, excepting for emergency jurisdiction provisions as set forth in N.C.G.S. § 50A-204.

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“[T]here is no bright line beyond which a parent’s conduct meets this standard. As we explained in *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997)], conduct rising to the ‘statutory level warranting termination of parental rights’ is unnecessary. Rather, ‘[u]nfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct . . . can also rise to this level so as to be inconsistent with the protected status of natural parents.’ ”

Id. at 549–50, 704 S.E.2d at 503 (citations omitted).¹¹ “[A] natural parent’s execution of a valid consent judgment granting exclusive care, custody, and control of a child to a nonparent, may be a factor upon which the trial court could base a conclusion that a parent has acted inconsistently with his or her constitutionally protected status.” *Yurek v. Shaffer*, 198 N.C. App. 67, 77, 678 S.E.2d 738, 745 (2009) (citations omitted); *see also Adams v. Tessener*, 354 N.C. 57, 61–62, 550 S.E.2d 499, 502 (2001) (when a parent voluntarily relinquishes custody to a nonparent for a significant period of time, this may constitute a basis for making a determination that the parent has acted inconsistently with her constitutionally protected status).

As our Supreme Court has determined:

[T]he United States Supreme Court has also recognized that protection of the parent’s interest is not absolute. . . . The Court pointed out its traditional adherence to the principle that “the rights of the parents are a counterpart of the responsibilities they have assumed.” In discussing this principle, the Court stated:

Thus, the “liberty” of parents to control the education of their children that was vindicated in [prior opinions] was described as a “right, coupled with the high duty, to recognize and prepare [the child] for additional obligations.” The linkage between parental duty and parental right was stressed again . . . when the Court declared it a cardinal principle “that the custody, care and nurture of the child reside

11. When a natural parent loses her constitutionally protected status, custody of a child as between that parent and a non-parent is decided using the best interest of the child standard as stated in N.C. Gen. Stat. § 50–13.2(a) (2017). *Price*, 346 N.C. at 84, 484 S.E.2d at 537.

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first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” In these cases the Court has found that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection.

In *Lehr*, the Court stressed the linkage between parental duty and parental right and noted that the father in that case had “never had any significant custodial, personal, or financial relationship with [the child], and he did not seek to establish a legal tie until after she was two years old.” The Court reasoned that

[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by “com[ing] forward to participate in the rearing of his child,” his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he “act[s] as a father toward his children.” But the mere existence of a biological link does not merit equivalent constitutional protection.

The Court further stated, “ ‘[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in “promot[ing] a way of life” through the instruction of children as well as from the fact of blood relationship.’ ”

Price, 346 N.C. at 76–77, 484 S.E.2d at 533 (citations omitted).

In *Boseman*, our Supreme Court discussed *Price*, stating:

Thus, under *Price*, when a parent brings a nonparent into the family unit, represents that the nonparent is a parent, and voluntarily gives custody of the child to the nonparent without creating an expectation that the relationship would be terminated, the parent has acted inconsistently with her paramount parental status.

Boseman, 364 N.C. at 550–51, 704 S.E.2d at 503 (citations omitted). In *Boseman*, upon the parent-mother’s initiation, she and a nonparent boyfriend were *jointly* raising the child and participating *equally* in parenting decisions – resulting in a stable, long-term family unit. “As

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such, the natural parent created along with the nonparent a family unit in which the two acted as parents, shared decision-making authority with the nonparent, and [by their actions] manifested an intent that the arrangement exist indefinitely.” *Id.* at 551, 704 S.E.2d at 504; *see also Id.* at 552, 704 S.E.2d at 504.¹²

Although the Florida Order was “temporary” and included a provision whereby Plaintiff could regain custody pursuant to a simplified process, absent specific action taken by Plaintiff, Defendant was granted full legal and physical custody of E.R.Q. until E.R.Q. reached adulthood. We hold that Plaintiff’s actions – and failure to act – after she “voluntarily [gave] custody of [E.R.Q.] to [Defendant],” *Id.* at 550–51, 704 S.E.2d at 503 (citations omitted), satisfies the requirement that Plaintiff did not “creat[e] an expectation that the relationship [between Defendant and E.R.Q.] would be terminated” at some point in the future. *Id.* at 550–51, 704 S.E.2d at 503. We base our holding in part on Plaintiff’s lack of meaningful interaction with E.R.Q. for a period of years, and on the fact that, other than the Florida action Plaintiff filed in 2009 then abandoned, Plaintiff failed to make any formal attempt to regain custody of E.R.Q. for over six years.

Further, in *Boseman*, *Price*, and other opinions cited therein, the biological parent continued to “act as a parent,” exercising control and providing support, but also decided to *share* those parental rights and obligations with a nonparent. In the present case, Plaintiff completely relinquished her parental responsibilities to Defendant for a period of years, and the only familial bond that occurred during those years was between Defendant and E.R.Q. *Price*, 346 N.C. at 76–77, 484 S.E.2d at 533–34.

We wish to make clear that Plaintiff’s voluntary relinquishment of custody to Defendant pursuant to the Florida Order, standing alone, should not in any manner be considered an act contrary to her protected status as a parent. The Florida statutes provide that option for a salutary

12. “[W]e recognize that there are circumstances where the responsibility of a parent to act in the best interest of his or her child would require a temporary relinquishment of custody, such as under a foster-parent agreement or during a period of service in the military, a period of poor health, or a search for employment. However, to preserve the constitutional protection of parental interests in such a situation, the parent should notify the custodian upon relinquishment of custody that the relinquishment is temporary, and the parent should avoid conduct inconsistent with the protected parental interests. Such conduct would, of course, need to be viewed on a case-by-case basis, but may include *failure to maintain personal contact with the child or failure to resume custody when able.*” *Price*, 346 N.C. at 83–84, 484 S.E.2d at 537 (emphasis added).

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purpose, and the use of those statutes for voluntary temporary relinquishment of custodial rights no doubt demonstrate acts of parental love and responsibility in most instances. Plaintiff's recognition that Defendant was in a better position to care for E.R.Q. *at the time Plaintiff consented to entry of the Florida Order* is presumed by this Court to have been an act of parental responsibility. However, Plaintiff's actions subsequent to entry of the Florida Order reflect either a lack of ability, or desire, to take on even minimal continuing acts of parental love or responsibility. Our Supreme Court has "emphasized that evidence of a parent's conduct should be viewed cumulatively." *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 267 (2003). The fact that Plaintiff, after years of inaction, eventually decided to make a concerted effort to regain custody of E.R.Q. should be considered in the analysis, but weighed in light of the many years in which Plaintiff fully relinquished her parental duties to Defendant. The relevant evidence presented in this case is exhaustively examined above, and we need not revisit it.

We hold, upon *de novo* review, that the determination that Plaintiff's conduct had been inconsistent with her constitutionally protected status as a parent was supported by clear and convincing evidence. *Boseman*, 364 N.C. at 549, 704 S.E.2d at 502; *Owenby*, 357 N.C. at 147, 579 S.E.2d at 268. The Bickett Order is affirmed and reinstated.

B. Defendants' Appeal

1. Jurisdiction to Enter the Randolph Order

[5] Defendant argues that Judge Randolph lacked subject matter jurisdiction to enter the 17 November 2016 Randolph Order. We agree.

We first recognize that once the district court obtains jurisdiction over a child custody matter, that jurisdiction continues until the child reaches the age of majority, or some other factor serves to divest the district court of jurisdiction. *See* N.C.G.S. § 50A-202; *Beck v. Beck*, 64 N.C. App. 89, 93, 306 S.E.2d 580, 582 (1983). Judge Bickett's recusal did not affect the continuing jurisdiction of the trial court over the subject matter of this action. However, the trial court may still lack jurisdiction to act in certain circumstances – for instance, as discussed below, when the matter is on appeal. As we discussed above in determining that Plaintiff had failed to timely file her notice of appeal from the Bickett Order, Plaintiff's purported Rule 59 motion for a new trial was not a proper Rule 59 motion.¹³ Therefore, Plaintiff never presented any proper

13. See section II., A., 1. of this opinion.

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Rule 59 motion to the trial court, and the trial court never obtained jurisdiction over the subject matter of Plaintiff's purported Rule 59 motion. *See Meehan v. Cable*, 135 N.C. App. 715, 721, 523 S.E.2d 419, 423 (1999). Absent jurisdiction to hear Plaintiff's Rule 59 motion, the trial court could not enter any valid order deciding Plaintiff's motion. *In re J.H.*, __ N.C. App. __, __, 780 S.E.2d 228, 233 (2015).

In addition, the Randolph Order was heard "on [] Plaintiff's Motion for New Trial, filed in response to the May 16, 2016 [Bickett] Order." In Plaintiff's motion for a new trial, she limited the bases for granting a new trial to those set forth "pursuant to Rule 59 of the N.C. Rules of Civil Procedure[.]" It is axiomatic that "[o]ne superior court judge may not overrule another." *Able Outdoor, Inc. v. Harrelson*, 341 N.C. 167, 169, 459 S.E.2d 626, 627 (1995) (citations omitted). However, "[i]f Judge [Bickett] did not have jurisdiction to act . . ., his order was a nullity and Judge [Randolph] could strike it." *Id.* This Court has specifically held that a judge who did not hear a case may not hear a Rule 59 motion for a new trial. *Sisk v. Sisk*, 221 N.C. App. 631, 636, 729 S.E.2d 68, 72 (2012) (judge who did not preside at trial "was without jurisdiction to enter an order on plaintiff's motion for new trial" pursuant to Rule 59).

Because we have held that Judge Bickett did have jurisdiction to enter the 16 May 2016 order, it was error for Judge Randolph to consider Plaintiff's 23 May 2016 motion for a new trial. "[A] judge who did not try a case may not rule upon a motion for a new trial. Judge [Randolph] was without jurisdiction to hear [P]laintiff's Rule 59 motion for a new trial." *Sisk*, 221 N.C. App. at 633, 729 S.E.2d at 70 (citations omitted). Because Judge Randolph lacked subject matter jurisdiction to hear Plaintiff's Rule 59 motion, the Randolph Order is void. Plaintiff argues that the rule in *Sisk* should not apply because Judge Bickett recused himself from participating in Plaintiff's Action. Plaintiff cites no authority for this position. It is true that a different judge than the one who presided at a trial may step in and perform certain acts – such as entering the order of the prior judge – pursuant to N.C. Gen. Stat. § 1A-1, Rule 63 (2017). *See In re Savage*, 163 N.C. App. 195, 197, 592 S.E.2d 610, 611 (2004). However, this Court has held that "[t]he function of a substitute judge under [Rule 63] is 'ministerial rather than judicial.'" *Id.* (citation omitted). "Rule 63 does not contemplate that a substitute judge, who did not hear the witnesses and participate in the trial, may nevertheless participate in the decision making process. It contemplates only . . . [performing] such acts as are necessary under our rules of procedure to effectuate a decision already made." *Id.* at 198, 592 S.E.2d at 611 (citations and quotation marks omitted). The trial court lacked jurisdiction

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to hear and decide Plaintiff's Rule 59 motion for a new trial on the *two separate bases* discussed above. We therefore vacate the 17 November 2016 Randolph Order.

2. Additional Issues

We take this opportunity to stress that a court without subject matter jurisdiction can do nothing more than recognize its lack of jurisdiction and make rulings that are directly consequent to that determination. Any additional action taken would be a nullity and unenforceable. However, because the orders of a trial court are not likely to be ignored, the trial court should strive to avoid confusion by refraining from including findings, conclusions, or decretal statements that lack legal effect. Had the trial court been correct in ruling in the Randolph Order that it lacked subject matter jurisdiction, it would have therefore lacked jurisdiction to make any additional substantive rulings. Subject matter jurisdiction is a prerequisite to any binding judicial determination. Therefore, it was improper for the trial court, *after determining that it lacked subject matter jurisdiction*, to conclude "that there exist sufficient grounds under . . . Rule 59 to warrant a new trial, if this [c]ourt obtains subject matter jurisdiction. This [c]ourt should give Full Faith and Credit to Florida law." It was equally improper for the trial court to decree that "Plaintiff's Motion for a New Trial is granted, if Florida releases subject matter jurisdiction to North Carolina[,] and that "Florida law applies to the interpretation of" the Florida Order. *See Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 22 S.E.2d 450, 453 (1942).

III. COA17-1344

[6] Defendant, by separate appeal in COA17-1344, appeals from the 2017 Order – Judge Randolph's 28 March 2017 "Child Custody Order." Defendant argues that the trial court lacked jurisdiction to enter the 2017 Order. We agree.

"An appeal is not 'perfected' until it is docketed in the appellate court, but when it is docketed, the perfection relates back to the time of notice of appeal, so any proceedings in the trial court after the notice of appeal are void for lack of jurisdiction." *Romulus v. Romulus*, 216 N.C. App. 28, 33, 715 S.E.2d 889, 892 (2011) (citation omitted). It is well established:

When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of

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Appellate Procedure; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

N.C. Gen. Stat. § 1-294 (2017). There are certain exceptions to this rule: “Notwithstanding the provisions of G.S. 1-294, an order pertaining to child custody which has been appealed to the appellate division *is enforceable* in the trial court by proceedings for civil contempt during the pendency of the appeal.” N.C. Gen. Stat. § 50-13.3 (2017) (emphasis added).

Subsequent to Defendant’s 16 December 2016 filing of her notice of appeal in COA17-675, which was perfected, Plaintiff filed a 4 January 2017 “Verified Motion in the Cause to Terminate Order for Temporary Custody” (the “Verified Motion”) in which Plaintiff requested termination of the Florida Order “pursuant to Ch. 751.05(6), Florida Statutes.” The trial court heard arguments on the Verified Motion on 14 March 2017, and then entered the 2017 Order. In the 2017 Order, the trial court concluded that it “should give Full Faith and Credit to Florida law” and decide the matter based upon Florida law. The 2017 Order purported to terminate the Florida Order, and award full legal and physical custody of E.R.Q. to Plaintiff.

Plaintiff makes several unavailing arguments in support of her contention that the trial court had jurisdiction to enter the 2017 Order even though the Bickett Order and the Randolph Order were on appeal in COA17-675. Plaintiff argues that the language in N.C.G.S. § 1-294 that an appeal “stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein,” does not apply in this matter because the issues decided in the 2017 Order were not “matters embraced” by the Bickett and Randolph Orders. However, in order to reach its ruling in the 2017 Order, the trial court had to “affirm” its own 17 November 2016 order – the Randolph Order – by implicit rulings that (1) Judge Bickett lacked subject matter jurisdiction to enter the Bickett Order pursuant to the UCCJEA; (2) it had the authority and jurisdiction to rule on Plaintiff’s Rule 59 motion; (3) Plaintiff had not forfeited her constitutionally protected status as a parent; (4) Plaintiff’s conduct had not served to alter the original nature of the Florida Order; (5) Florida law controlled the North Carolina trial court’s authority to modify the Florida Order, even after North Carolina obtained subject matter jurisdiction pursuant to the UCCJEA; (6) a North Carolina trial court can modify a custody order from another state without any finding of changed circumstances or a determination of whether modification would be in the best interest of the child – N.C.G.S. § 50-13.7(b)

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notwithstanding; and (7) that Plaintiff's motion for a new trial should be granted. *See Carpenter v. Carpenter*, 25 N.C. App. 307, 308-09, 212 S.E.2d 915, 916 (1975) (the purpose of N.C.G.S. § 1-294 is to prevent the trial court from deciding the very matters that were embraced in a previous order). Our resolution of the appeal in COA17-675 includes holdings directly contrary to each of these implied rulings of the trial court in the 2017 Order.

Further, this Court has clearly held that an appeal from an order involving child custody removes jurisdiction from the trial court to consider *any* issues related to custody of the child involved:

We find that the district court lacked the authority to issue the 31 October 1986 and 3 November 1986 orders, and, conclude that these orders are null and void for the following reason.

N.C.G.S. § 1-294 states in part:

When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

It is established that “[v]isitation privileges are but a lesser degree of custody.” As a result, the 5 March 1986 order, extending visitation rights, appealed by defendant is directly related to and will affect the 31 October 1986 and 3 November 1986 orders determining custody, issued by the trial court. Therefore, N.C.G.S. § 1-294 removed jurisdiction on the issue of custody from the district court in the present case.

Furthermore, the Supreme Court in *Joyner v. Joyner*, 256 N.C. 588, 124 S.E.2d 724 (1962), specifically addressed the question of who has jurisdiction over a minor child when a custody matter is pending on appeal. In *Joyner*, the Court concluded that “North Carolina cases fit into the general rule that appeal removes the entire proceeding to the [appellate] Court and leaves the [lower] court *functus officio* until the cause is remanded.”

Consequently, under both statute and case law the district court lost jurisdiction over all custody matters in the

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present case when defendant appealed the 5 March 1986 visitation order.

Hackworth v. Hackworth, 87 N.C. App. 284, 286–87, 360 S.E.2d 472, 472–73 (1987) (citations omitted);¹⁴ *see also Rosero v. Blake*, 150 N.C. App. 250, 252–54, 563 S.E.2d 248, 250–51 (2002), *rev'd on other grounds*, 357 N.C. 193, 581 S.E.2d 41 (2003).

Plaintiff argues “[i]t is logical that a ‘matter’ wherein the Court of North Carolina [sic] has subject matter jurisdiction is a separate ‘matter’ from one in which North Carolina does not have subject matter jurisdiction.” The issue of subject matter jurisdiction was one of the central issues on appeal in COA17-675, which is enough to defeat Plaintiff’s argument. Plaintiff’s argument is further discredited by the fact that her assumption that this Court would determine that the trial court lacked jurisdiction to enter the Bickett Order in the COA17-675 appeal was not only an improper assumption to make, but incorrect as well.

Because prior orders involving the custody of E.R.Q. – the Bickett Order and the Randolph Order – were on appeal in COA17-675, the trial court was without jurisdiction to hear or decide any issues directly related to E.R.Q.’s custody during the pendency of the COA17-675 appeal. *Carpenter*, 25 N.C. App. at 309, 212 S.E.2d at 916 (citations omitted) (“[P]ending the appeal the trial judge is *functus officio*. Therefore, the [trial c]ourt in the present case had no jurisdiction to hear and pass upon defendant’s motion filed on 19 November 1974 while the appeal of this case was pending in the Court of Appeals.”). Because the matter of E.R.Q.’s custody was on appeal when the trial court entered the 2017 Order, that order is void and of no effect.

From the evidence included in the record concerning the 2017 Order, it appears E.R.Q. was erroneously removed from Defendant on 2 April 2017 by a court without jurisdiction to do so. This Court now holds that custody of E.R.Q. was never properly removed from Defendant and, based on our holdings, legal custody of E.R.Q. continues to reside with Defendant, and physical custody of E.R.Q. must be returned to Defendant.

14. The adoption of the provision in N.C.G.S. § 50-13.3 to allow a trial court to enforce custody orders pursuant to its contempt powers did not “overrule” *Joyner*, as Plaintiff argues. It simply created a new, specific, and limited right. The general principle acknowledged in *Joyner* survives, as evidenced by *Hackworth* and other opinions citing *Joyner* for this principle subsequent to adoption of the relevant provision in N.C.G.S. § 50-13.3.

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IV. Visitation

[7] Of the orders appealed in COA17-675 and COA17-1344, only the Bickett Order survives – the Randolph Order and the 2017 Order are void and vacated. We note that though Defendant’s 8 January 2013 responsive pleading to Plaintiff’s initial motion in the cause – in effect, Defendant’s answer and counterclaims – “prayed” the trial court order that “Defendant be given permanent custody of [E.R.Q.,]” and grant Plaintiff “supervised visitation” with E.R.Q., it does not appear from the record that the counterclaims in Defendant’s responsive pleading have been decided by the trial court.

Plaintiff and Defendant have thus far handled the issue of visitation in this matter through temporary consent orders. Plaintiff and Defendant first “agreed on a temporary modification of child custody pending trial,” and this agreement was entered as a temporary consent custody order on 1 May 2013. That consent order provided Plaintiff with certain visitation and other rights to which she had not previously been legally entitled. Additional consent orders modifying custody/visitation rights were entered prior to entry of the Bickett Order.

Following entry of the Bickett Order – and Plaintiff’s motion for a new trial – Plaintiff and Defendant again agreed on a modified visitation schedule, which was entered as a “Temporary Custody Order” on 7 September 2016. The trial court entered an order on 13 December 2016 in which it, with the agreement of Plaintiff and Defendant, modified a visitation provision of the 7 September 2016 temporary custody order. It further ruled that, “[e]xcept as modified herein, the Temporary Custody Order filed 09/07/2016 remains in full force and effect, subject to the contempt powers of the [c]ourt.” Defendant filed her notice of appeal from the Randolph Order on 16 December 2016, and Plaintiff filed her notice of appeal from the Bickett Order on 19 December 2016. Therefore, these orders establishing a visitation schedule were entered before jurisdiction over the matter was removed from the trial court to this Court by appeal. N.C.G.S. § 1-294.

Though the 2017 Order purported to “supersede[] and vacate all other North Carolina Orders in this court file[,]” the 2017 Order is void and of no effect. Neither Plaintiff nor Defendant have challenged the 13 December 2016 consent order on appeal. Therefore, the visitation provisions included and incorporated into the 13 December 2016 consent order are the last visitation provisions agreed upon by Plaintiff and Defendant and entered as a temporary consent custody order. Since the 2017 Order is a nullity, the 13 December 2016 consent order remains in effect until it is modified, vacated, or made permanent by the trial court.

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V. Conclusion

Based upon our holdings above, we reach the following dispositions: (1) Although Plaintiff's appeal could be dismissed for failure to timely file notice of appeal from the 16 May 2016 Bickett Order, we grant *certiorari sua sponte* and address Plaintiff's arguments; (2) pursuant to our analyses above, we dismiss or reject Plaintiff's arguments on appeal and affirm the 16 May 2016 Bickett Order; (3) we vacate the 17 November 2016 Randolph Order on two independent grounds – (a.) Plaintiff's purported 23 May 2016 Rule 59 motion for a new trial was insufficient to confer subject matter jurisdiction on the trial court, and (b.) because Judge Bickett had subject matter jurisdiction when he entered the Bickett Order, Judge Randolph could not “overrule” the Bickett Order and substitute his own judgment for the prior judgment of Judge Bickett; (4) the Bickett Order is currently the controlling order in this matter, and any actions taken by the trial court that conflict with the rulings in the Bickett Order are rendered void and must be corrected; (5) the appeal in COA17-675 divested the trial court of jurisdiction to consider Plaintiff's Verified Motion, therefore the 2017 Order appealed in COA17-1344 is void and vacated; (6) Pursuant to the Bickett Order, legal and physical custody of E.R.Q. remains with Defendant as initially directed by the Florida Order; (7) because physical custody of E.R.Q. was improperly removed from Defendant, physical custody of E.R.Q. must be returned to Defendant; (8) the trial court shall use its discretion in weighing Defendant's right to immediate physical custody against E.R.Q.'s welfare when determining when and how to return E.R.Q. to Defendant's physical custody, *but the return of E.R.Q. to Defendant's physical custody shall not be unreasonably delayed*; (9) because the 2017 Order is void, legal custody of E.R.Q. has remained with Defendant since entry of the Florida Order, though the effect of entry of the 2017 Order was to deprive Defendant of the rights attendant to her legal custody of E.R.Q.; therefore, Defendant's right to exercise her legal custodial rights shall be immediately restored, with the following caveat; (10) the trial court may impose *temporary* restrictions on Defendant's legal custodial rights upon a determination that such restrictions are required to prevent unnecessary stress or hardship for E.R.Q.,¹⁵ (11) the visitation orders

15. By way of example only, and not intended to be binding or limiting on the discretion of the trial court, the trial court could immediately transfer authority to make certain major decisions involving E.R.Q. – e.g. major medical decisions, or other decisions likely to significantly impact E.R.Q.'s physical, mental, or social welfare – to Defendant, but grant Plaintiff temporary authority to make necessary day-to-day logistical decisions concerning E.R.Q. until transfer of physical custody is achieved.

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entered by the trial court, culminating in the 13 December 2016 order, remain in effect until modified or vacated by the trial court; (12) the trial court, preferably pursuant to a consent agreement, shall establish a temporary visitation plan that best serves the interests of E.R.Q. for the transition period prior to return of physical custody to Defendant;¹⁶ (13) nothing in this opinion should be interpreted as interfering with the continuing jurisdiction of the trial court over this matter, and the trial court shall continue to resolve any custody-related issues that may arise, as long as they have not been finally resolved by this opinion or prior valid orders of the trial court; (14) the trial court may not revisit certain issues that have become the law of this case including, but not limited to, the correct law to apply if modification of the Florida Order is again sought, jurisdictional issues decided in this opinion, and prior rulings of the trial court that have either not been challenged or that have been upheld on appeal; and (15) that Plaintiff has lost her constitutionally protected status as a parent is an issue that has been finally decided and that may not be revisited by the trial court.

COA17-675: PLAINTIFF'S APPEAL DISMISSED, 16 MAY 2016 ORDER AFFIRMED; 17 NOVEMBER 2016 ORDER VACATED; REMANDED. COA17-1344: 26 MARCH 2017 ORDER VACATED; REMANDED.

Judge MURPHY concurs.

Judge BRYANT concurs in result only.

16. Of course, as long as the trial court retains jurisdiction, it may revisit custody/visitation issues concerning E.R.Q. when they are properly before the court.

SMITH v. N.C. DEP'T OF PUB. INSTRUCTION

[261 N.C. App. 430 (2018)]

DANIEL SMITH, PETITIONER

v.

N.C. DEPARTMENT OF PUBLIC INSTRUCTION, RESPONDENT

No. COA17-1361

Filed 18 September 2018

1. Public Officers and Employees—career status—dismissal—unacceptable personal conduct

A dismissed career State employee's behavior constituted unacceptable personal conduct under the Human Resources Act where he engaged in a loud confrontation with a female colleague over his dissatisfaction with a planned "Ugly Christmas Sweater" contest; he behaved inappropriately while conducting an interview by, among other things, expressing his dissatisfaction with his supervisor to the interviewee and stating that he was considering filing a lawsuit against his employer; and by "liking" two sexually suggestive social media posts while using an account in which he identified himself as an employee of the Department of Public Instruction.

2. Public Officers and Employees—career status—dismissal—just cause

Where a career status State employee engaged in a pattern of petulant, inappropriate, and insubordinate behavior throughout several years of his employment, his unacceptable personal conduct gave rise to just cause for his dismissal. The administrative law judge's factual findings supported this conclusion, including findings concerning the employee's work history that were not expressly referenced within the dismissal letter.

Appeal by petitioner from order entered 21 August 2017 by Administrative Law Judge Donald W. Overby in the Office of Administrative Hearings. Heard in the Court of Appeals 8 August 2018.

Schiller & Schiller, PLLC, by David G. Schiller, for petitioner-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tiffany Y. Lucas, for respondent-appellee.

DAVIS, Judge.

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In this case, a State agency dismissed a career status employee following a pattern of insubordinate and inappropriate conduct on the part of the employee that occurred over a period of years. The employee challenged his discharge in the North Carolina Office of Administrative Hearings, and an administrative law judge upheld the dismissal. Because we conclude that his discharge did not violate North Carolina law, we affirm.

Factual and Procedural Background

Daniel Smith was employed by the North Carolina Department of Public Instruction ("DPI") as a section chief in the Student Certification and Credentialing Section beginning on 18 January 2011. Throughout the time period relevant to this litigation, Smith was supervised by Jo Honeycutt, the director of DPI's Career and Technical Education ("CTE") Division. One of Honeycutt's duties as Smith's supervisor was to complete annual evaluations of his performance as an employee.

For the 1 July 2013 through 30 June 2014 review period, although Honeycutt gave Smith an overall rating of "Very Good" on his evaluation, she rated his performance on the "Client Focus" standard as "Below Acceptable." Honeycutt further noted on the evaluation that Smith needed to place "additional focus" on "improved communication with stakeholders and respect for others in the agency."

During that time period, Smith sent multiple inflammatory emails to employees of DPI partner organizations. In June 2013, Smith emailed a representative of the Association for Career and Technical Education ("ACTE") to inquire when an article Smith had submitted would be published in ACTE's trade publication. After the ACTE representative informed Smith that his article might not be published until the following year and asked him whether this was acceptable, Smith responded, "NO, I'm not good at all with the information nor your tone." In the same email, Smith wrote the following: "I'm not going away! Print the truth about credentialing or I'll take it down the street . . . Threat, no. Promise, yes."

In November 2013, a vice-president of the National Institute for Automotive Service Excellence circulated information in an email that Smith read regarding a meeting about automotive programs and credentialing that was to take place at an upcoming ACTE conference. Smith replied to the email as follows: "Not a single member of the NC CTE staff will be attending this conference headed by corrupt persons out to enrich themselves [sic] at the expense of our children!" He copied two DPI employees from his section on this email.

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In July of 2014, Smith wore a tank top and shorts to a social event that took place during a professional conference. Honeycutt met with Smith after the conference to discuss DPI's expectations regarding appropriate attire for its employees both in the workplace and at work-related events. The following month, Smith expressed his opinion to Claire Miller, DPI's Assistant Human Resources Director, that DPI's dress code was discriminatory against men in that women were permitted to wear open-toed shoes while men were not. In response to Smith's concerns, DPI's existing dress code guidelines were withdrawn on 4 September 2014 while DPI leadership considered whether to issue new guidelines.

On 22 September 2014, Smith was scheduled to be a presenter during morning and afternoon sessions of a conference hosted by DPI at Wrightsville Beach. Although Smith was prepared to present at the beginning of the morning session, he left the conference after a few minutes because no conference attendees had yet come to his session. Because he failed to return to the conference that day, Smith did not give his scheduled presentation during the afternoon session even though conference attendees were, in fact, present at that session.

In October 2014, DPI staff learned from employees at the North Carolina Department of Labor ("DOL") that Smith had provided a reference to DOL staff for a former DPI employee whom he did not supervise during that individual's employment at DPI. Upon investigating the matter, Honeycutt determined that Smith had "misled another state supervisor" through his actions and issued him a written warning for misconduct.

Smith filed a complaint against DPI with the Equal Employment Opportunity Commission ("EEOC") on 30 September 2015. In his complaint, he alleged that DPI had retaliated against him for voicing his concerns about its dress code guidelines by, among other things, falsely accusing him of not attending the September 2014 Wrightsville Beach conference, giving him a written warning for misconduct, and moving his work cubicle to a new location.¹ Thereafter, Smith openly discussed with colleagues at DPI the fact that he had filed an EEOC complaint.

Revised dress code guidelines were made available to DPI employees on 9 October 2015. Smith subsequently printed the new guidelines on colorful paper and posted them in several places throughout his division. Upon discovering that the guidelines he posted had been taken

1. The EEOC dismissed Smith's complaint on 7 March 2016.

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down and thrown away, Smith retrieved them from the trash can and hung them up again.

On 8 December 2015, Smith became involved in an argument with Carol Short, a female colleague at DPI, about an “Ugly Christmas Sweater” contest that was scheduled to take place at DPI’s upcoming holiday party. During the exchange, which was overheard by several colleagues, Smith spoke in a loud and argumentative voice while making disparaging remarks about the contest and calling it discriminatory against men. He cited the contest as another example of how women “made all the decisions” at DPI.

Short was very upset by this exchange and reported to DPI Human Resources staff her concerns about the 8 December incident and her belief that Smith’s behavior created a hostile work environment for female employees. From January to April 2016, a DPI review team (the “Review Team”) comprised of Human Resources personnel and internal audit staff conducted an investigation into Short’s allegations against Smith. As part of its investigation, the Review Team interviewed approximately 21 DPI employees, including Smith. During his interview with the Review Team, Smith repeatedly responded to questions about the 8 December 2015 incident by giving answers such as “I do not wish to discuss [it] with you at this time” and “I don’t care to share.”

On 1 February 2016, Christy Cheek, the CTE director for the Buncombe County Schools System, forwarded an email to Honeycutt that Cheek had received from an individual named Sharon Verdu. In her email, Verdu stated that she had applied for a health science consultant position with DPI in September 2015 and that Smith behaved unprofessionally toward her during the interview process. Specifically, Smith told Verdu that he and Honeycutt “did not get along well and that [Honeycutt] discriminated against him because he was male.” Smith further informed Verdu that he might be filing a lawsuit for discrimination against DPI. In her email, Verdu wrote that she believed Smith was attempting to encourage her to remove her name from consideration for the position given his statement to her that “the first candidate hit it out of the ballpark in her interview” and the fact that Smith gave Verdu his personal cell phone number so that she could call and inform him if she decided to withdraw her application. Ultimately, Verdu did, in fact, withdraw her application from consideration for the health science consultant position.

On 29 March 2016, Honeycutt received an email from Trina Williams, the CTE coordinator for the Hickory Public Schools System, regarding

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two postings that Smith had “liked” on his LinkedIn account. The first post was by an author of “erotic and paranormal romance.” The caption for the post read, “Let’s Talk Sex . . .” and the post contained a picture of a woman’s breasts in a bra. The second post contained a picture of multiple scantily clad women.

Upon concluding its investigation into Short’s allegations against Smith, the Review Team submitted a report to DPI’s director of Human Resources on 11 May 2016. In its report, the Review Team found that Smith’s behavior toward Short on 8 December 2015 was “intimidating to her” and that Smith “frequently engaged in a pattern of unwelcome behavior toward women, including . . . humiliating treatment of women in public professional settings. This behavior is especially egregious from a person in a leadership position.” The report further stated that Smith’s conduct in the workplace “had a detrimental impact on CTE staff and performance and disrupted the work of the division, even negatively impacting the brand of the division with its clients.” The Review Team recommended that DPI leadership take “appropriate action” with regard to Smith.

On 18 May 2016, Smith received a pre-disciplinary conference notification letter from Honeycutt. Smith, Miller, and Honeycutt were present at the conference, which was held later that same day. During the conference, Smith was given an opportunity to respond to the issues set out in the notice, which included his (1) confrontation with Short; (2) accusations that DPI was discriminatory toward men and conduct in posting the revised dress code guidelines; (3) handling of Verdu’s interview for the health science consultant position; and (4) LinkedIn account activity. Smith told Honeycutt and Miller that he believed his actions in posting the dress code guidelines were “beneficial to CTE staff” and denied the allegations concerning Verdu’s interview with him. He further stated that he thought it was appropriate for him to “like” the first LinkedIn post because “as an educator [he] valued authors even if the author wrote about erotic, paranormal activity.”

By means of a letter dated 19 May 2016 (the “Dismissal Letter”), Honeycutt notified Smith that his employment with DPI was being terminated. After discussing the fact that Smith had repeatedly and publicly “criticized [Honeycutt] and DPI leadership” and engaged in disrespectful and insubordinate behavior on multiple occasions, the letter listed the specific grounds forming the basis for his dismissal as follows:

1. *Showing disrespect to co-worker(s) or authorized supervisor that harms the cohesiveness in the*

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organization or hinders the organization in carrying out effectively its tasks, goals, and mission according to [DPI] Human Resources Division Discipline Policy and Procedure, section 2[.]

- a. On December 8, 201[5], you were disrespectful to Ms. Carol Short in the interchange you had with her in Dr. David Barbour's cubicle, by raising your voice, talking over her, and pointing your finger in her face and the effect of your behavior harmed the cohesiveness in our division.
 - b. As cited above, I recently learned that you have made critical statements about me to several others in our division most especially since the Fall of 2015 and that the pattern of your open and public criticism of me has harmed the cohesiveness of CTE.
 - c. In recent months, you have openly and with several CTE staff, noted that you have a "lawsuit" against [DPI] because [DPI] is discriminatory toward men. The statements you have made, your behavior such as posting the dress guidelines repeatedly has harmed the cohesiveness in CTE, and is unbecoming conduct of a CTE leader.
2. *Conduct unbecoming of a State employee that is detrimental to State service according to [DPI] Human Resources Division Discipline Policy and Procedure, section 2.*
- a. As cited above, how you handled the search for the Health Consultant was in contradiction to Human Resources policy and unbecoming conduct of a state leader.
 - b. Posting or "liking" the 2 items on [your] Linkedin [sic] account as noted above when you were connected to other CTE professionals, is inconsistent with [DPI]'s mission and harms the reputation of you, CTE, and [DPI]. This is considered conduct unbecoming and is detrimental to state service.

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On 6 June 2016, Smith filed an internal grievance with DPI that challenged his discharge. Following a hearing, he was notified by letter dated 1 September 2016 of DPI's decision to uphold his dismissal. Smith filed a petition for a contested case hearing in the North Carolina Office of Administrative Hearings ("OAH") on 27 September 2016 in which he argued that DPI had dismissed him without just cause in violation of the North Carolina Human Resources Act. *See* N.C. Gen. Stat. § 126-1 *et seq.* (2017).

A hearing was held in OAH that took place on 13 January 2017, 4 May 2017, 12 May 2017, and 13 May 2017 before Administrative Law Judge ("ALJ") Donald W. Overby. On 21 August 2017, the ALJ issued a Final Decision containing the following pertinent findings of fact:

40. On or about December 8, 2015, [Smith] was involved in a verbal exchange with a female colleague and fellow DPI Section Chief, Ms. Carol Short. During this verbal exchange, [Smith] became upset and raised his voice while expressing his dissatisfaction to Ms. Short about the "Ugly Christmas Sweater" contest which was planned as part of the Division's upcoming annual holiday party.

41. [Smith] was visibly and audibly upset during the exchange with Ms. Short, and was overheard by several colleagues speaking in a loud and argumentative voice to her. During the exchange with Ms. Short, [Smith] made disparaging remarks about the contest, calling it discriminatory against men, and cited it as another example of how women at DPI made all the decisions. [Smith] also incorrectly accused Ms. Short of being responsible for IT courses being moved from his section to hers.

42. Ms. Short was very upset by the exchange with [Smith] and discussed it with her supervisor, Ms. Honeycutt. In turn, Ms. Honeycutt suggested to Ms. Short that she discuss her concerns with HR staff.

43. Ms. Short reported her concerns about [Smith] to HR staff on December 15, 2015, and again on January 28, 2016. Ms. Short alleged that she was unlawfully harassed by [Smith] due to her gender, and that [Smith] had created a hostile work environment for her and other women at DPI. In addition, Ms. Short reported that [Smith]: (a) had asked her whether she "ratted" on him to the CTE Division Director; (b) openly and publicly criticized the

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CTE Division Director; (c) discussed his performance and a disciplinary action he received; and (d) shared that he had a “lawsuit” against DPI. Ms. Short indicated that she believed these actions had a detrimental effect on the Division work force and were disruptive to the work environment.

....

53. On February 1, 2016, Ms. Christy Cheek, the CTE Director with the Buncombe County Schools System, forwarded to Ms. Honeycutt an email sent to her (Ms. Cheek) from Ms. Sharon Verdu. Ms. Verdu stated in her email that she had applied for a Health Science consultant position at DPI in September 2015, and that as part of the interview process with [Smith], he had acted unprofessionally towards her. Among other things, Ms. Verdu stated that [Smith] told her that he and Ms. Honeycutt did not get along well and that Ms. Honeycutt discriminated against him because he was male. Ms. Verdu also stated that [Smith] told her that he might be filing a lawsuit for discrimination against DPI. Ms. Verdu stated that she felt as though [Smith] was trying to discourage her from staying in as a candidate for the Health Science consultant position because [Smith] had told her after her interview that, “the first candidate hit it out of the ballpark in her interview.” Then he gave her his personal cell phone number so she could call him and let him know if she was going to withdraw her application. Ultimately, Ms. Verdu withdrew her application for the position from consideration.

54. At the hearing in this matter, Ms. Verdu maintained that, during the interview process, [Smith] criticized Ms. Honeycutt and the work environment within the CTE Division. He also indicated to her that he might be leaving DPI for another job and discouraged her from staying in the running for the position for which she had applied. Ms. Verdu explained why she had delayed in coming forward to report how [Smith] had acted inappropriately and unprofessionally toward her as part of the interview process. Ms. Verdu also explained that [Smith]’s conduct had a negative impact on her perception of DPI and influenced her decision, in part, about whether to stay in the application process.

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. . . .

59. On March 29, 2016, Ms. Honeycutt received email correspondence about [Smith] from the CTE Coordinator with the Hickory Public Schools System, Ms. Trina Williams. In the emails from Ms. Williams, she included two photos/images that were posted to [Smith]'s LinkedIn account. Both images were of women, some in scanty dress and one of a woman's breasts in a bra. The caption for one of the posts read, "Let's talk sex ..." Upon receiving the emails from Ms. Williams, Ms. Honeycutt sent them to Ms. Miller and expressed her concern to Ms. Miller that the posting of the images by [Smith] on his LinkedIn account demonstrated "unprofessional conduct or at least poor judgment when the profile has the employer name."

Based upon his findings of fact, the ALJ made the following pertinent conclusions of law:

14. Based on the preponderance of the evidence, [DPI] met its burden of proof that it had "just cause" to dismiss [Smith] for unacceptable personal conduct.

15. [Smith]'s conduct of engaging in a heated discussion with Carol Short on December 8, 2015 was unacceptable personal conduct justifying dismissal. During that conversation, he raised his voice at her, talked over her, argued with her about the Division's holiday sweater contest being discriminatory against men, accused her of stealing IT courses away from his Section, and became visibly and audibly angry.

16. As a Section Chief in the CTE Division, [Smith]'s conduct of openly and repeatedly making critical statements about the CTE Division Director to others in the Division, including complaining that the Division Director is an unfair and critical supervisor who targeted [Smith] for unfair treatment, was unacceptable personal conduct justifying dismissal.

17. As a Section Chief in the CTE Division, [Smith]'s conduct of openly sharing with others within the Division that he had a lawsuit or action against DPI based on the agency's alleged discriminatory dress code, and posting and reposting the dress code guidelines throughout the Division, was unacceptable personal conduct justifying dismissal.

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18. As a Section Chief in the CTE Division, [Smith]'s conduct of making inappropriate comments to a prospective employee of DPI, including derogatory comments about DPI's CTE Division Director, and comments discouraging the candidate from continuing in the application and hiring process, was unacceptable personal conduct justifying dismissal.

19. As a Section Chief in the CTE Division, [Smith]'s conduct of posting or "liking" risqué images on his LinkedIn account was unacceptable personal conduct justifying disciplinary action.

20. To the degree that evidence has been admitted in this contested case hearing which is not articulated with particularity in the four-corners of the dismissal letter, that evidence is admitted in keeping with Heard-Leak v. N.C. State Univ. Ctr. for Urban Affairs, 798 S.E.2d 394, 398 (N.C. Ct. App. 2016)[.]

....

22. These multiple incidents of misconduct, which had a detrimental effect on the cohesiveness of the Division and the workplace environment, when viewed in their totality, and in light of [Smith]'s failure to respond positively to multiple past attempts by [DPI] to provide feedback and effectuate change in [Smith]'s workplace behavior, constitute unacceptable personal conduct justifying dismissal. [DPI] has met its burden to show that it had "just cause" to dismiss [Smith].

Smith filed a timely notice of appeal to this Court pursuant to N.C. Gen. Stat. §§ 7A-29(a) and 126-34.02(a).

Analysis

Before we address the specific arguments made by Smith in this appeal, it is appropriate to review both the substantive provisions of law that govern the ability of State agencies to discipline career employees and the statutory framework applicable to appeals of such personnel decisions.

The North Carolina Human Resources Act provides that "[n]o career State employee . . . shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C. Gen. Stat. § 126-35(a) (2017).

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Our Supreme Court has explained that “[j]ust cause is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case.” *Wetherington v. N.C. Dep’t of Pub. Safety*, 368 N.C. 583, 591, 780 S.E.2d 543, 547 (2015) (citation and quotation marks omitted).

“There are two bases for the . . . dismissal of employees under the statutory standard for ‘just cause’ as set out in G.S. 126-35.” 25 N.C. Admin. Code 1J.0604(b) (2018). First, a career State employee may be dismissed based on “unsatisfactory job performance.” *N.C. Dep’t of Env’t & Natural Res. v. Carroll*, 358 N.C. 649, 666, 599 S.E.2d 888, 899 (2004). Second, an employee may be dismissed based on “unacceptable personal conduct.” *Id.*

This Court [has] delineated the difference between unacceptable job performance and unacceptable personal conduct and held that termination for engaging in the latter category is appropriate for those actions for which no reasonable person could, or should, expect to receive prior warnings. The State Personnel Manual lists, “careless errors, poor quality work, untimeliness, failure to follow instructions or procedures, or a pattern of regular absences or tardiness” as examples of unsatisfactory job performance. Unacceptable personal conduct includes “insubordination, reporting to work under the influence of drugs or alcohol, and stealing or misusing State property.”

Leeks v. Cumberland Cty. Mental Health Developmental Disab. & Sub. Abuse Facil., 154 N.C. App. 71, 76-77, 571 S.E.2d 684, 688-89 (2002) (internal citations, quotation marks, brackets, and emphasis omitted).

The North Carolina Administrative Code defines “unacceptable personal conduct” as:

- (a) conduct for which no reasonable person should expect to receive prior warning;
- (b) job-related conduct which constitutes a violation of state or federal law;
- (c) conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts the employee’s service to the State;
- (d) the willful violation of known or written work rules;

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- (e) conduct unbecoming a state employee that is detrimental to state service;
- (f) the abuse of client(s), patient(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility or an animal owned by the State;
- (g) absence from work after all authorized leave credits and benefits have been exhausted;
- (h) falsification of a state application or in other employment documentation.

25 N.C. Admin. Code 1J.0614(8).

In *Warren v. N.C. Dep't of Crime Control*, 221 N.C. App. 376, 726 S.E.2d 920, *disc. review denied*, 366 N.C. 408, 735 S.E.2d 175 (2012), this Court articulated a three-part test to determine whether just cause exists to discipline an employee who has engaged in unacceptable personal conduct: (1) whether the employee actually engaged in the conduct the employer alleged; (2) whether the employee's conduct falls within one of the categories of unacceptable personal conduct; and (3) whether the misconduct constitutes just cause for the disciplinary action taken. *Id.* at 383, 726 S.E.2d at 925 (citation omitted).

"The North Carolina Administrative Procedure Act (APA), codified at Chapter 150B of the General Statutes, governs trial and appellate court review of administrative agency decisions." *Amanini v. N.C. Dep't of Human Res.*, 114 N.C. App. 668, 673, 443 S.E.2d 114, 117 (1994) (citation omitted). Chapter 150B of the North Carolina General Statutes provides, in pertinent part, as follows:

The Court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced by the findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;

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- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2017). In situations “[w]here the asserted error falls under subsections 150B-51(b)(5) and (6), we apply the whole record standard of review.” *Whitehurst v. East Carolina Univ.*, __ N.C. App. __, __, 811 S.E.2d 626, 631 (2018) (citation and quotation marks omitted).

A court applying the whole record test may not substitute its judgment for the agency’s as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence—that which detracts from the agency’s findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency’s decision. “Substantial evidence” is defined as “relevant evidence a reasonable mind might accept as adequate to support a conclusion.”

Watkins v. N.C. State Bd. of Dental Exam’rs, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004) (internal citations omitted).

Where the petitioner alleges that the agency decision “was based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been considered by the agency.” *Souther v. New River Area Mental Health Developmental Disabilities & Substance Abuse Program*, 142 N.C. App. 1, 4, 541 S.E.2d 750, 752 (citation omitted), *aff’d per curiam*, 354 N.C. 209, 552 S.E.2d 162 (2001). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [ALJ].” *In re Appeal of the Greens of Pine Glen Ltd. P’ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted).

I. Specificity of Allegations in Dismissal Letter

Initially, Smith contends that two of the five stated grounds for his discharge contained in the Dismissal Letter were not sufficiently specific to meet the notice requirements of the Human Resources Act. He asserts that the following two statements of misconduct set forth in Paragraph 1 of the letter were not stated with the requisite particularity:

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b. As cited above, I recently learned that you have made critical statements about me to several others in our division most especially since the Fall of 2015 and that the pattern of your open and public criticism of me has harmed the cohesiveness of CTE.

c. In recent months, you have openly and with several CTE staff, noted that you have a “lawsuit” against [DPI] because [DPI] is discriminatory toward men. The statements you have made, your behavior such as posting the dress guidelines repeatedly has harmed the cohesiveness in CTE, and is unbecoming conduct of a CTE leader.

N.C. Gen. Stat. § 126-35(a) provides that before a career State employee may be discharged, “the employee shall . . . be furnished with a statement in writing setting forth the specific acts or omissions that are the reasons for the [termination].” N.C. Gen. Stat. § 126-35(a). This Court has stated that the purpose of the statute’s notice requirement is to “provide the employee with a written statement of the reasons for his discharge so that the employee may effectively appeal his discharge.” *Heard-Leak*, __ N.C. App. at __, 798 S.E.2d at 398 (citation and quotation marks omitted); see also *Owen v. UNC-G Physical Plant*, 121 N.C. App. 682, 687, 468 S.E.2d 813, 817 (1996) (“Failure to provide names, dates, or locations makes it impossible for the employee to locate the alleged violations in time or place, or to connect them with any person or group of persons, thereby violating the statutory requirement of sufficient particularity.” (internal citations, quotation marks, and brackets omitted)); *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 351, 342 S.E.2d 914, 922 (N.C. Gen. Stat. § 126-35(a) “was designed to prevent the employer from summarily discharging an employee and then searching for justifiable reasons for the dismissal”), *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986). Consequently, “the written notice must be stated with sufficient particularity so that the discharged employee will know precisely what acts or omissions were the basis of his or her discharge.” *Heard-Leak*, __ N.C. App. at __, 798 S.E.2d at 398 (citation, quotation marks, and brackets omitted).

Smith argues that the above-quoted statements from the Dismissal Letter are insufficient under N.C. Gen. Stat. § 126-35(a) because they fail to provide “the names of the people [Smith] allegedly spoke to, the dates when he allegedly spoke to them or what he said.” He does not, however, contend that the remaining grounds set out in paragraph (1)(a) and in paragraph (2)(a) and (b) of the Dismissal Letter were impermissibly

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vague. Instead, his argument on this issue solely references the grounds listed in paragraph (1)(b) and (c) of the letter.

The Dismissal Letter — a single-spaced document that was over four pages in length — contained additional information elaborating on the specific grounds for dismissal identified in the letter. While it is true that the letter could have provided additional detail as to the grounds Smith references, we note that he does not argue that any such lack of detail actually prevented him from contesting the grounds for his dismissal.

In any event, even assuming *arguendo* that the grounds listed in paragraph (1)(b) and (c) of the Dismissal Letter were too vague, we conclude — as discussed in more detail below — that the remaining grounds set out in the letter were sufficient to support his discharge. *See Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (“One act of [unacceptable personal conduct] presents just cause for any discipline, up to and including dismissal.” (citation and quotation marks omitted)).

II. Existence of Just Cause For Dismissal

a. Whether Smith Engaged in the Alleged Conduct

Smith does not challenge Findings of Fact Nos. 40-43, 53-54, and 59 made by the ALJ. Thus, these factual findings are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (“Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.”). Finding Nos. 40-43 concern Smith’s 8 December 2015 altercation with Short while Finding Nos. 53-54 and 59 relate to Smith’s conduct during Verdu’s job interview and his LinkedIn account activity, respectively. Thus, because these findings have not been challenged by Smith, they establish that Smith did, in fact, engage in the conduct described therein. Accordingly, the first prong of the *Warren* test is satisfied with regard to these acts that formed the basis for Smith’s discharge.

b. Whether Smith’s Actions Constituted Unacceptable Personal Conduct

[1] We must next determine whether Smith’s behavior rose to the level of unacceptable personal conduct. As noted above, unacceptable personal conduct under the Human Resources Act is a broad “catch-all” category that encompasses a wide variety of misconduct by State employees that can result in dismissal without the need for a prior warning. This Court has found the existence of unacceptable personal conduct in a number of different contexts. *See, e.g., Robinson v. Univ. of*

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N.C. Health Care Sys., 242 N.C. App. 614, 617, 775 S.E.2d 898, 900 (2015) (hospital employee displayed explosive behavior in meetings, showed disrespect for her supervisors, and repeated unsupported claims that employer was discriminating against her); *Hilliard*, 173 N.C. App. at 596, 620 S.E.2d at 16 (superintendent of correctional center improperly ate food from dining hall, accepted personal services from inmates and employees, and used State equipment to send personal faxes and make non-work related long distance telephone calls); *N.C. Dep't of Corr. v. Brunson*, 152 N.C. App. 430, 432, 567 S.E.2d 416, 418 (2002) (probation officer held in contempt of court for talking during proceeding after magistrate ordered silence). Furthermore, with regard to the “conduct unbecoming a state employee” prong of the unacceptable personal conduct definition, we have held that “no showing of actual harm is required . . . , only a potential detrimental impact (whether conduct like the employee’s could potentially adversely affect the mission or legitimate interests of the State employer)”. *Hilliard*, 173 N.C. App. at 597, 620 S.E.2d at 17 (citation omitted).

It is undisputed that on 8 December 2015 Smith became involved in a loud confrontation with Short that was precipitated by his dissatisfaction with a planned “Ugly Christmas Sweater” contest. During the altercation — which was overheard by several colleagues — he became “visibly and audibly upset,” referred to the contest as “another example of how women at DPI made all the decisions,” and accused Short of being responsible for the removal of Internet Technology courses from his section. This incident resulted in Short believing that Smith had harassed her because of her gender and had created a hostile work environment for female employees at DPI.

Smith also engaged in highly inappropriate conduct during Verdu’s interview for the health science consultant position. He informed Verdu that he and Honeycutt “did not get along well and that [Honeycutt] discriminated against him because he was male.” Smith also told Verdu that he was considering filing a lawsuit against DPI for discrimination, criticized the work environment at CTE, and gave Verdu his personal cell phone number so that she could immediately inform him if she decided to withdraw her application from consideration. Finally, his conduct in “liking” two sexually suggestive LinkedIn posts while using an account in which he identified himself as an employee of DPI represented yet another instance of inappropriate behavior.

We are satisfied that Smith’s actions had the potential to adversely affect the mission of DPI and constituted conduct unbecoming a State employee that is detrimental to State service. Therefore, we hold that

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the ALJ did not err in determining Smith's actions constituted unacceptable personal conduct under the Human Resources Act.

c. Whether Smith's Conduct Constituted Just Cause for His Dismissal

[2] The final question before us is whether Smith's improper conduct gave rise to just cause for his termination as opposed to a lesser form of disciplinary action. This Court has held that "[u]nacceptable personal conduct does not necessarily establish just cause for all types of discipline." *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925. Thus, the final prong of the *Warren* test requires us to "balance the equities" by "examin[ing] the facts and circumstances of [the] case" in order to determine whether the "conduct constitutes just cause for the [specific type of] disciplinary action taken." *Id.* at 379, 382, 726 S.E.2d at 923, 925.

Here, Smith displayed a pattern of petulant, inappropriate, and insubordinate behavior at DPI that extended over the course of several years. Despite repeated attempts on the part of Honeycutt and others at DPI to convince him to behave more appropriately, Smith failed to make any meaningful changes to his workplace behavior.

Smith nevertheless argues that the ALJ erred in making certain findings of fact that were not directly connected to those grounds for his termination that were stated with specificity in his Dismissal Letter. Specifically, he contends that Findings of Fact Nos. 8-38, 44-52, 57-58, 60, 62, 64, 65, and 67 were made in error because they "deal with subjects that are not contained in the dismissal letter as reasons for the dismissal."² We disagree.

Although it is true that some of these factual findings concern events not expressly referenced within the four corners of the Dismissal Letter, we do not believe that their inclusion was improper. Our appellate courts have held that an employee's work history is a relevant consideration in reviewing the level of discipline imposed against a career State employee. *See, e.g., Blackburn v. N.C. Dep't of Pub. Safety*, 246 N.C. App. 196, 208, 784 S.E.2d 509, 518 ("[E]vidence of petitioner's prior disciplinary history was properly considered as part of the ALJ's review of the level of discipline imposed against petitioner."), disc. review denied, 368 N.C. 919, 786 S.E.2d 915 (2016); *see also N.C. Dep't of Env't & Natural Res.*, 358 N.C. at 670, 599 S.E.2d at 901 (determining that agency lacked

2. We note that the only finding of fact actually challenged by Smith as unsupported by substantial evidence in the record is Finding No. 64.

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just cause to demote petitioner where petitioner had been “a reliable and valued employee . . . for almost twenty years with no prior history of disciplinary actions against him.”).

In the present case, the factual findings made by the ALJ that Smith challenges as beyond the scope of the Dismissal Letter concern a number of incidents that occurred during his employment at DPI. Among other subjects, these challenged findings of fact reference (1) inflammatory emails sent by Smith to employees of DPI partner organizations; (2) inappropriate attire worn by Smith to work functions; (3) Smith's failure to give his scheduled presentation during the 22 September 2014 DPI conference; and (4) the misleading reference given by Smith to DOL staff and the official warning letter for misconduct that he received as a result. These findings serve to support the legal validity of DPI's determination that Smith's repeated misconduct warranted his dismissal.

* * *

Although the North Carolina Human Resources Act provides important protections for career State employees, it does not immunize workers from discharge after engaging in the type of longstanding insubordinate and highly inappropriate behavior that occurred here. Therefore, we affirm the ALJ's conclusion that just cause existed for Smith's dismissal.

Conclusion

For the reasons stated above, we affirm the 21 August 2017 Final Decision of the ALJ.

AFFIRMED.

Judges DILLON and INMAN concur.

SNEED v. SNEED

[261 N.C. App. 448 (2018)]

JASON M. SNEED, PLAINTIFF

v.

CHARITY A. SNEED, DEFENDANT

No. COA17-1169

Filed 18 September 2018

1. Evidence—expert testimony—reliability—relevance—forensic custody evaluation

The trial court did not abuse its discretion in a child custody action by admitting a forensic custody evaluator's testimony and report regarding her evaluation of the family. The testimony and report were relevant and reliable pursuant to Rule of Evidence 702(a) where the evaluator spent approximately one year conducting her evaluation, issued a 43-page report, and explained the principles and methods used in conducting the evaluation.

2. Child Visitation—temporary suspension of parent's visitation—purposeful alienation of children by one parent—children's best interests

The trial court did not abuse its discretion by ordering a conditional, temporary suspension of a mother's visitation rights to her children where the mother had purposefully alienated the children from their father and thereby had caused a detriment to the children's welfare.

3. Appeal and Error—findings of fact—challenged—inconsequential to outcome

In a child custody case, a mother's challenges to certain findings of fact were overruled where an expert's testimony (which she had challenged as inadmissible in a previous argument) supported several of the findings, and the other challenged findings had no bearing on the outcome of the case.

Appeal by defendant from order entered 12 January 2017 by Judge Gary L. Henderson in Mecklenburg County District Court. Heard in the Court of Appeals 6 June 2018.

Jason M. Sneed, pro se, for plaintiff-appellee.

McIlveen Family Law Firm, by Angela W. McIlveen and David E. Simmons, for defendant-appellant.

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ELMORE, Judge.

Defendant Charity A. Sneed (“Mother”) appeals from an order essentially granting Mother and plaintiff Jason M. Sneed (“Father”) joint custody of their teenaged children pending commencement of a reunification program designed to repair the children’s relationship with Father, which the trial court found had been damaged by Mother’s alienating behaviors. The order provides that Father shall have primary physical custody of the children upon commencement of the program, while Mother’s visitation with the children shall be temporarily suspended pending completion of the program. The order further provides that the children attend public or private school rather than be homeschooled by Mother.

On appeal, Mother contends the trial court abused its discretion in denying her motion to exclude the expert testimony and report of the parties’ consented to and court-appointed forensic custody evaluator; that it abused its discretion in suspending Mother’s visitation with the children pending their completion of the reunification program with Father; and that nine of the court’s findings of fact are unsupported by the evidence.

For the reasons stated herein, we affirm.

I. Background

There were three children born of the parties’ August 1996 marriage, to wit: a daughter, born March 1999, and two sons, born January 2001 and May 2003.

Father initiated this action by filing a complaint for custody on 5 January 2015. That same day, Father hand-delivered Mother a copy of the complaint along with a letter from his attorney, which included the following relevant excerpts:

[Father] is aware of your adulterous conduct. Having committed adultery and having been caught, it is appropriate that you vacate the marital residence. Please make arrangements to do so immediately, leaving the children in their home and in [Father]’s care. [Father] is willing to work with you to arrange a reasonable schedule of shared physical custody.

Pending resolution of [Father]’s claim for child custody, demand is made that you not remove the children from the State of North Carolina.

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Mother's response to the complaint and letter was to immediately remove the children to South Carolina without Father's knowledge or permission, and to cut off the children's contact with Father. On 6 January 2015, Father filed an *ex parte* motion for emergency custody relief in which he alleged that Mother had an ongoing relationship with a man who lived in Sweden; that Mother had plans to travel internationally with the children despite Father's objection; and that Father was concerned Mother would leave the United States with the children and not return. The trial court granted Father temporary and exclusive custody of the children in an emergency order dated 7 January 2015.

Upon Mother's return to North Carolina, and despite the terms of the January 2015 order, the parties agreed between themselves to a week-to-week rotating schedule of physical custody. However, on 19 August 2015, Father filed a motion for custody evaluation in which he alleged that Mother was not complying with the agreed-upon schedule; that Mother, who had homeschooled the children since birth, was alienating the children from Father; and that Father's relationship with the children was continuing to deteriorate.

Following a 1 September 2015 hearing, the trial court entered a consent order appointing Dr. Karen Shelton as a forensic custody evaluator. The court tasked Dr. Shelton with considering the mental health of the parties, their strengths and weaknesses, the parent-child relationships, the parents' behaviors that may affect that relationship, the children's needs, and any treatment recommendations, and it requested that Dr. Shelton provide the court with her custody recommendations.

The court also entered an updated "order on emergency child custody, temporary parenting arrangement" on 3 December 2015. The December 2015 order explained that the matter had been delayed from January to September 2015 and that an emergency no longer existed, and it provided that the parties share joint physical custody on a week-to-week rotating schedule "pending a hearing on permanent custody[.]" The order addressed such details as holiday visitation, exchange of the minor children, transportation to extracurricular activities, access to records, and communication between the parties.

On 10 March 2016, Father filed motions for contempt and custody modification in which he alleged that Mother was still refusing to comply with the week-to-week rotating schedule. Father specifically alleged that he had not visited with the parties' daughter since 1 September 2015, and that Mother had "undertaken a course of conduct designed to alienate" their sons from Father. Father's motions were denied following

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a 24 May 2016 hearing in which the parenting coordinator, the parties' daughter, the children's therapists, and Mother all testified.

A permanent custody hearing took place on 16 and 17 November as well as 5 and 6 December 2016. On the morning of 16 November 2016, Mother filed a motion *in limine* "to exclude the custody evaluation report of Dr. Karen Shelton and trial testimony of Dr. Karen Shelton."¹ The trial court denied Mother's motion and subsequently accepted Dr. Shelton "as an expert in the field of child custody evaluation and child psychology." Dr. Shelton's expert testimony included her opinion as to the matters she had been tasked by the court to consider, and her August 2016 custody evaluation report was admitted into evidence.

In an order dated 12 January 2017, the trial court essentially granted the parties joint custody pending commencement of Family Bridges: A Workshop for Troubled and Alienated Parent-Child Relationships. The order specifically provides:

1. Plaintiff/Father and the minor children shall participate in the Family Bridges program as soon as administratively possible and in all events, this program shall be completed prior to March 25, 2017 when [the parties' daughter] turns eighteen (18). Pending the commencement of the reunification program, the parties shall continue to operate under the physical custody schedule set forth in the December 3, 2015 custody order.
2. As soon as administratively possible, Plaintiff/Father shall have primary physical custody of the minor children and [he] and the minor children shall attend the Family Bridges program.
3. Beginning on the commencement date of the Family Bridges program, and pending the completion of the requirements as set forth herein, Defendant/Mother shall have no contact with the minor children[.]
-
5. The parties are granted joint legal custody of the minor children.

1. Mother also filed motions to exclude the testimony "of the minor children's treating clinicians, counselors, therapists, and psychologists" and "of Kary Watson," the court-appointed parenting coordinator, but she did not appeal the denial of those motions.

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. . . .

13. Beginning January 1, 2017, [the parties' sons] shall cease homeschooling and shall be enrolled in a public or private school. Plaintiff/Father shall discuss the school choice in good faith with Defendant/Mother, but shall have final-decision making authority if the parties cannot come to a mutual decision.

14. This Order is subject to review pending the completion of the Family Bridges program and a period of consecutive no contact between Defendant/Mother and any of the minor children lasting for ninety (90) consecutive days. Should Defendant/Mother have contact with the children prior to the expiration of the no-contact period, the period of no contact shall begin again . . . until ninety (90) consecutive days have passed without parent-child contact. At the conclusion of the no-contact period, this Court will determine the conditions, timing, and nature of resumption of contact between Defendant/Mother and the minor children with the assistance of and input from any aftercare professional(s).

Mother entered notice of appeal from the order on 10 February 2017.

II. Analysis

Mother contends the trial court abused its discretion in denying her motion to exclude Dr. Shelton's expert testimony and report and in temporarily suspending Mother's visitation rights. She also argues that nine of the court's thirty-six findings of fact are unsupported by the evidence.

A. The trial court did not abuse its discretion in denying Mother's motion to exclude Dr. Shelton's expert testimony and report.

[1] Mother first contends the trial court abused its discretion in denying her motion to exclude Dr. Shelton's expert testimony and report because neither the testimony nor report were relevant or reliable as required by Rule 702(a) of our Rules of Evidence.

"When reviewing the ruling of a trial court concerning the admissibility of expert opinion testimony, the standard of review is whether the trial court committed an abuse of discretion." *State v. Ward*, 364 N.C. 133, 139, 694 S.E.2d 738, 742 (2010) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004)). "An abuse of discretion results where the court's ruling is manifestly unsupported by reason

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or is so arbitrary that it could not have been the result of a reasoned decision.” *Id.* (citations, quotation marks, and brackets omitted).

Rule 702(a) “has three main parts, and expert testimony must satisfy each to be admissible.” *State v. McGrady*, 368 N.C. 880, 889, 787 S.E.2d 1, 8 (2016). “First, the area of proposed testimony must be based on scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue. This is the relevance inquiry.” *Id.* Second, the witness must be qualified as an expert by skill, knowledge, experience, training, or education. *Id.* at 889, 787 S.E.2d at 9. And third,

the testimony must meet the three-pronged reliability test that is new to the amended rule: (1) The testimony must be based upon sufficient facts or data. (2) The testimony must be the product of reliable principles and methods. (3) The witness must have applied the principles and methods reliably to the facts of the case.

Id. at 890, 787 S.E.2d at 9 (citations, quotation marks, and brackets omitted).

In the instant case, Mother specifically argues that Dr. Shelton’s testimony and report were neither relevant nor reliable. As to relevancy, she contends Dr. Shelton’s contributions did not provide insight beyond conclusions the trial court could readily draw from its ordinary experience. According to Mother, Dr. Shelton merely provided “a version of facts found . . . after interviewing many of the same people, and reviewing much of the same records, that came before the trial court.” Regarding reliability, Mother argues that Dr. Shelton’s opinion was “short on methodology”; “contains no order of operations, step by step analysis, or information regarding the principles or methods relied upon to create it”; and “never states the actual technique used.” The record reveals that Mother’s argument is meritless.

In this particular case, Dr. Shelton spent approximately one year conducting her custody evaluation, and she issued her forty-three page report on 15 August 2016. At trial, Dr. Shelton explained that a child custody evaluation is “a comprehensive evaluation that gathers information in order for the expert to form opinions related to the court’s determination of child custody and parenting plans.” She then proceeded to describe the general process of conducting such an evaluation as follows:

After a court order is obtained, the [custody] evaluation includes multiple components. It includes a review

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of records. It includes interviews with the parents. It includes . . . parent-child observations and interviews with the children. It . . . often includes psychological testing of the parents. It includes obtaining collateral information [from] third parties that are familiar with the family, the children . . . that may . . . have observations or input about what's happening in this family dynamic.

Dr. Shelton went on to testify to and elaborate on the conclusions and analysis contained in her report.

Because Mother has failed to demonstrate how the trial court abused its discretion in admitting the expert testimony and report of Dr. Shelton—the consented-to and court-appointed forensic custody evaluator—this assignment of error is overruled.

B. The trial court did not abuse its discretion in ordering a conditional, temporary suspension of Mother's visitation rights.

[2] Mother next contends the trial court abused its discretion in suspending her visitation rights without finding that visitation is not in the best interest of the minor children as required by N.C. Gen. Stat. § 50-13.5(i).

The court has wide discretion to fashion an order which will best serve the interests of the child; thus, “[t]he decision of the trial court regarding custody will not be upset on appeal absent a clear showing of abuse of discretion, provided that the decision is based on proper findings of fact supported by competent evidence.” *Woncik v. Woncik*, 82 N.C. App. 244, 247, 346 S.E.2d 277, 279 (1986).

“While a noncustodial parent has a right to reasonable visitation, that right is limited to avoid jeopardizing the child’s welfare.” *Id.* at 250, 346 S.E.2d at 280-81. Pursuant to N.C. Gen. Stat. § 50-13.5(i), the trial court, “prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child *or* that such visitation rights are not in the best interest of the minor child.” N.C. Gen. Stat. § 50-13.5(i) (2017) (emphasis added).

In the instant case, the trial court “had ample evidence before him to justify a conclusion that [Mother] had purposefully engaged in a course of conduct designed to alienate the child[ren]’s affections for [their] father, and that these actions were detrimental to the child[ren]’s welfare.” *Woncik*, 82 N.C. App. at 250, 346 S.E.2d at 281. Moreover, the court did not permanently deny Mother the right of reasonable visitation;

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rather, the court specifically found and concluded that “Defendant/Mother is a fit and proper person to exercise visitation with the minor children, however, it is in the minor children’s best interests and welfare that Defendant/Mother’s visitation with the minor children be suspended pending completion of the Family Bridges program[.]” The court’s order thus complied with the requirements of N.C. Gen. Stat. § 50-13.5(i).

Because the trial court did not abuse its discretion “in fashioning an order designed to prevent further harm to the child[ren] from this type of behavior,” this assignment of error is overruled. *Woncik*, 82 N.C. App. at 250-51, 346 S.E.2d at 281.

C. The trial court’s findings of fact are supported by competent evidence.

[3] In her final argument on appeal, Mother challenges findings of fact nos. 23, 24, 25, 27, 28, 29, 31, 33, and 34 as unsupported by the evidence.

According to Mother, the only evidence to support findings 23, 27, 28, 29, and 31 came from Dr. Shelton’s testimony. These findings read as follows:

23. During the trial of this matter, the Court heard from four neutral parties: Lucy Dunning and Maria Curran, the family’s therapists; Kary Watson, the parenting coordinator; and Karen Shelton, the Court-appointed forensic evaluator. All four witnesses indicated, and the Court so finds, that since the date of the parties’ separation Defendant/Mother has engaged in behaviors designed to alienate the minor children from Plaintiff/Father.

27. In her report to this Court, Dr. Karen Shelton, the agreed-upon and Court-ordered custody evaluator, testified and the Court so finds that Defendant/Mother exaggerated her concerns and allegations about Plaintiff/Father. Dr. Shelton described, and this Court so finds, that Defendant/Mother acted as a “gatekeeper,” or a parent who designates or controls access to the other parent. Dr. Shelton testified and the Court so finds that the “gatekeeping” she observed by Defendant/Mother was severe and unhealthy.

28. Dr. Shelton further testified and this Court so finds that although the minor children’s education has progressed satisfactorily under Defendant/Mother’s homeschooling, Defendant/Mother has begun to use homeschooling as a

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weapon to diminish the relationship between the minor children and Plaintiff/Father.

29. Dr. Shelton further recommended the intervention of the Family Bridges program to repair the damaged relationship between Plaintiff/Father and the minor children. The Court finds that this program would be in the best interests and welfare of the minor children.

31. The minor children's behavior since separation reflects Defendant/Mother's efforts to alienate the relationship between the minor children and Plaintiff/Father. [The parties' daughter] has not spoken substantively with Plaintiff/Father in over one (1) year, and [the parties' sons'] behavior toward Plaintiff/Father is dictated completely by Defendant/Mother. Most recently, an application was submitted to Liberty Preparatory Academy in [the older son's] name. The application deceptively included what purported to be Plaintiff/Father's electronic signature, although Plaintiff/Father had never seen the application. Further, the application included an email address for [the older son] that listed [the older son's] last name as Johnston, Defendant/Mother's maiden name. Prior to the date of the parties' separation, Plaintiff/Father had a close and loving relationship with all of the minor children. Currently, as a result of Defendant/Mother's acts, those relationships are strained and damaged.

Mother makes no further argument as to the lack of evidentiary support for these findings other than to insist that Dr. Shelton's testimony was inadmissible.

Because Dr. Shelton's testimony was admissible as discussed above, we conclude that findings 23, 27, 28, 29, and 31 were supported by the evidence.

Mother also challenges finding 24, the final sentence of finding 25, finding 33, and finding 34, which read as follows:

24. The minor children . . . attended counseling with Ms. Dunning in the Spring of 2016. On May 24, 2016, Ms. Dunning testified at a Motion for Contempt hearing in this matter. At that hearing, Ms. Dunning recommended: that Plaintiff/Father and Defendant/Mother attend counseling for co-parenting; that the minor children attend

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reunification therapy with Plaintiff/Father; and that Defendant/Mother receive individual counseling to alleviate her anxieties about the minor children establishing a relationship with Plaintiff/Father. The Court finds that these recommendations were reasonable and appropriate and in the best interests of the minor children. Ms. Dunning testified and the Court so finds that instead of following those recommendations, Defendant/Mother unilaterally chose to terminate the minor children's relationship with Ms. Dunning.

25. Maria Curran supervised the children's therapy and conducted family therapy for the parties and the children. At the trial of this matter, Dr. Curran testified and the Court so finds that the minor children appeared unconcerned about the status of their relationship with Plaintiff/Father. Dr. Curran recommended the Family Bridges Program, which she testified has a 95% success rate.

33. Defendant/Mother is a fit and proper person to have visitation with the minor children. However, pending the minor children's completion of reunification therapy with Plaintiff/Father, such visitation shall be suspended as set forth below.

34. Since June of 2016, both [the parties' sons] have been more engaged in activities with Plaintiff/Father. [They] have been well-behaved, traveled to family events, and participated in family activities with Plaintiff/Father. However, this Court finds that they were "being deceptive" in their engagement with Plaintiff/Father.

As to finding 24, Mother contends the finding "is unsupported by evidence because it asserts that [Mother] chose to do something 'instead of' following recommendations of which she was unaware." She argues that the evidence does not support a finding that Ms. Dunning made any recommendations at the May 2016 hearing, and that Mother was therefore unaware of the recommendations. However, the evidence shows that Mother and her attorney had been informed of Ms. Dunning's recommendations as of May 2016.

Mother also challenges the final sentence of finding 25, stating that while "Dr. Curran testified she was 'familiar' with the [Family Bridges] program, she offered no recommendation."

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Similarly, Mother's entire argument as to finding 33 consists of three sentences in which she takes issue with the trial court's reference to "reunification therapy." Mother states that, "[a]s 'reunification therapy' is not defined, [she] assumes this means the Family Bridges program. Dr. Shelton recommended Family Bridges, and testified it was not a therapeutic program, but an educational program."

As to finding 34, Mother contends there was "no evidence that [the parties' sons] were 'being deceptive' in their engagement with [Father]."

We conclude that Mother's specific challenges to findings 24, 25, 33, and 34 are inconsequential and do not warrant further review. *See, e.g., Black Horse Run Prop. Owners Ass'n-Raleigh, Inc. v. Kaleel*, 88 N.C. App. 83, 86, 362 S.E.2d 619, 622 (1987) ("Where there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings which do not affect the conclusions."). This assignment of error is overruled.

III. Conclusion

The trial court did not abuse its discretion in denying Mother's motion to exclude the expert testimony and report of the parties' consented-to and court-appointed forensic custody evaluator, nor in temporarily suspending Mother's visitation with the children pending their completion of the reunification program with Father. Moreover, the trial court's findings of fact are supported by the evidence. Accordingly, the order of the trial court is hereby:

AFFIRMED.

Judges HUNTER, JR. and ZACHARY concur.

STATE v. EDWARDS

[261 N.C. App. 459 (2018)]

STATE OF NORTH CAROLINA

v.

DOUGLAS NELSON EDWARDS

No. COA18-337

Filed 18 September 2018

1. Evidence—cross-examination—limits—matters raised during direct examination

In a trial for multiple offenses arising from the abduction and assault of a six-year-old girl, the trial court abused its discretion by limiting defendant's cross-examination of the State's witnesses about his post-arrest interrogation after the State elicited evidence regarding defendant's questioning the night before he was arrested. The trial court did not adhere to Rule of Evidence 611, which does not limit cross-examination to relevant matters raised during direct examination. However, the error was not prejudicial to defendant's case given the overwhelming evidence of defendant's guilt and the fact that the jury heard the evidence defendant sought to admit when he testified on his own behalf.

2. Sentencing—aggravating factors—sufficiency of notice—statutory procedure

In a case involving multiple offenses arising from the abduction and assault of a six-year-old girl, the Court of Appeals rejected defendant's arguments that aggravating factors must be alleged in an indictment, and that the jury instruction for the aggravating factor of "heinous, atrocious, or cruel" was unconstitutionally vague. The State complied with N.C.G.S. § 15A-1360.16 by giving defendant written notice of the aggravating factors it intended to prove, a procedure that conforms with U.S. Supreme Court precedent. The latter argument has been rejected previously by the N.C. Supreme Court.

Judge MURPHY concurring in result only.

Appeal by defendant from judgments entered 21 September 2017 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 7 August 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General L. Michael Dodd, for the State.

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[261 N.C. App. 459 (2018)]

Marilyn G. Ozer for defendant.

ARROWOOD, Judge.

Douglas Nelson Edwards (“defendant”) appeals from judgments entered on his convictions for attempted first degree murder, statutory sex offense with a child by an adult, assault with deadly weapon inflicting serious injury (“AWDWISI”), first degree kidnapping, and taking indecent liberties with a child. For the following reasons, we find no prejudicial error.

I. Background

On 14 November 2016, a New Hanover County Grand Jury indicted defendant on one count of attempted first degree murder, one count of statutory sex offense with a child by an adult, one count of statutory rape of a child by an adult, one count of AWDWISI, one count of first degree kidnapping, and two counts of indecent liberties with a child. Additionally, on 20 February 2017, a New Hanover County Grand Jury indicted defendant on one count of intimidating a witness and one count of felony obstruction of justice.

Defendant’s case was tried in New Hanover County Superior Court before the Honorable Phyllis M. Gorham beginning on 11 September 2017. The evidence at trial tended to show that shortly before 5:00 p.m. on 14 September 2016, defendant abducted a six-year-old girl (the “juvenile”) from in front of her home in the Royal Palms Mobile Home Park. Defendant drove with the juvenile on his moped to a wooded area, assaulted the juvenile, and bound the juvenile to a tree with a chain around her neck. Based on witnesses who either saw the defendant in the mobile home park, saw the abduction, or recognized defendant when they saw him driving on the moped with the juvenile, law enforcement was quickly able to identify defendant as a suspect.

Within a short time from the abduction, law enforcement stopped defendant twice. During the second stop, defendant agreed to go to the sheriff’s office to be interviewed. During the interview on 14 September 2016, defendant denied knowing anything about the abduction. When law enforcement became convinced defendant was not going to confess, law enforcement took defendant to his aunt’s house and released him under surveillance with the hope that defendant would return to the location where he left the juvenile.

Law enforcement continued to search for the juvenile through the night. Based on witnesses’ recollections, cell phone tracking, and gps

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and video from a school bus that passed defendant while he was pulled to the side of the road, law enforcement was able to use canines to locate and rescue the juvenile the following morning.

After the juvenile was rescued, defendant, who was still being surveilled by law enforcement, was arrested. Defendant was unaware the juvenile had been rescued at the time. During defendant's post-arrest interrogation on 15 September 2016, defendant admitted to the abduction and took law enforcement to the location where he left the juvenile and from where the juvenile was rescued. Defendant learned the juvenile had been rescued after he could not find the juvenile where he left her.

Acknowledging there was insufficient evidence of statutory rape, the State voluntarily dismissed the rape charge at the close of the State's evidence. The State also conceded there was no evidence of intent with deceit for felony obstruction of justice and requested that the jury be instructed on misdemeanor obstruction of justice.

On 20 September 2017, the jury returned verdicts finding defendant guilty of attempted first degree murder, statutory sex offense with a child by an adult, AWDWISI, first degree kidnapping, and two counts of indecent liberties with a child. The jury returned verdicts finding defendant not guilty of intimidating a witness and obstruction of justice. The trial court entered judgment on the not guilty verdicts on 20 September 2017.

Pursuant to a notice of aggravating factors filed by the State on 22 June 2017, the State argued to the jury on 21 September 2017 that the offenses were "especially heinous, atrocious, or cruel" and that "[t]he victim was very young." The jury determined both aggravating factors applied to each offense. The trial court determined an aggravated sentence was justified for each offense based on the jury's determination that each offense was "especially heinous, atrocious or cruel." The trial court arrested judgment on one of the indecent liberties with a child convictions and entered separate judgments for each of the other convictions sentencing defendant as a prior record level IV to consecutive terms, each at the top of the aggravated range for each offense, totaling 970 to 1,320 months of imprisonment. The trial court also ordered defendant to register as a sex offender for life following his release. The trial court postponed its determination on satellite-based monitoring. Defendant gave notice of appeal in open court following sentencing. Appellate entries were received on 25 September 2017.

Defendant subsequently filed a Motion for Appropriate Relief ("MAR") on 29 September 2017 challenging the aggravated sentences. By

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order filed 13 November 2017, the trial court denied defendant's MAR. Appellate entries related to the MAR were received on 28 November 2017.

II. Discussion

On appeal, defendant challenges the trial court's decision to disallow cross-examination of the State's witnesses regarding his post-arrest interrogation and the trial court's denial of his MAR.

1. Cross-Examination

[1] Defendant first argues his constitutional rights to due process, a fair trial, and the right to silence were violated when the trial court limited his opening statement and prevented him from cross-examining the State's witnesses concerning his admission and his attempt to help investigators rescue the juvenile during his post-arrest interrogation. Defendant asserts that

[b]ecause [he] was charged with attempted first degree murder and assault with a deadly weapon with intent to kill, both of which required the State to prove that [he] intended the child would die, it was critical to the defense to be able to show the jurors that [he] did tell the officers where she was located and actually led them to the site.

Defendant claims he was forced to testify because of the trial court's erroneous evidentiary rulings. As a result of the alleged errors and constitutional violations, defendant contends he is entitled to a new trial on the attempted first degree murder and assault with a deadly weapon with intent to kill charges. We disagree.

At the outset, we note that defendant was not charged with assault with a deadly weapon with intent to kill, as defendant asserts. Defendant was charged with and convicted of assault with a deadly weapon inflicting serious injury; therefore, intent to kill was not at issue for the assault offense.¹

Moreover, a review of the record shows the trial court did not grant a motion by the State to limit defendant's opening statement and did not order defendant not to mention his post-arrest interrogation in his

1. A review of the records reveals the trial court entered judgment in count 3 of file number 16 CRS 6867 for "AWDW intent to kill" in violation of N.C. Gen. Stat. § 14-32(c). This appears to be a clerical error as defendant was indicted, the jury was instructed, and defendant was convicted of AWDWISI in violation of N.C. Gen. Stat. § 14-32(b). Both felony assaults have the same punishment class and remand is appropriate to correct the clerical error.

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opening statement, as defendant avers. In fact, the State never made such a motion. Prior to the opening statements, the State indicated that it would not be introducing all of defendant's statements to law enforcement and argued it was not required to do so under Rule 106 because the pre- and post-arrest interviews were discrete. The State explained that it was raising the issue prior to opening statements because it did not want the defense to mention evidence that may not be introduced during the presentation of the State's case. Specifically, the State asserted that "while [the defense] certainly can make whatever opening they want to do, they do that at their peril of either not being able to back up what they say or having to put on a case that they might not otherwise have wanted to." After additional clarification of the State's position—that the State's presentation of evidence from the interview of defendant on 14 September 2016 did not open the door to cross-examination by the defense regarding the post-arrest interrogation of defendant on 15 September 2016—the State further explained that, preemptively,

[it] just wanted to give [the defense] the warning that [it] believe[s], . . . that if [the defense] makes any opening statement to promises [the jury will] hear [evidence regarding defendant's post arrest interrogation], that's going to be requiring [the defense] to put on a case which they're not constitutionally required at this point to do. And I didn't want that trial strategy to be something that the defendant said he was forced into doing because of some utterance by his attorney during opening, which is, of course, not evidence.

. . . . [The State didn't] want [defendant] to claim that this is a trial strategy that he did not endorse and agree with . . . and he is now forced to go down that road because he's been placed there by his attorneys.

Although the defense disagreed with the State's position that the post-arrest interrogation was a discrete interview, the defense acknowledged that it understood the State's argument that "unless [the defense is] prepared to put on some evidence, [it] [could not] say to the jury in [its] opening the [defendant] later took them to that scene." The trial court simply replied, "[y]ou would be doing that at your own risk."

Because the trial court did not actually limit the defense's opening statement, the issues to be addressed are whether the trial court erred by disallowing the defense's cross-examination of the State's witnesses and whether defendant was prejudiced thereby.

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In this case, the State elicited testimony from law enforcement officer's about defendant's statements during road-side stops and an interview on 14 September 2016. The State, however, did not elicit any testimony regarding the post-arrest interrogation of defendant on 15 September 2016 and sought to prevent defendant from introducing any evidence from its witnesses regarding the post-arrest interrogation during cross-examination. The trial court sided with the State and disallowed the defense from questioning the State's witnesses concerning defendant's post-arrest interrogation. However, in order to fully address the issue, it is necessary to understand how the issue was repeatedly raised during defendant's trial.

The State called attention to the issue just prior to calling Detective Lisa Hudson to testify. The State informed the court that it "intend[ed] to introduce through Detective Hudson a recorded video and audio interview that was conducted by Detective Hudson of this defendant on the night of September 14, 2016." At that time, the State asserted the same argument that it did prior to opening arguments, that the questioning of defendant on 14 September 2016 was separate from the post-arrest interrogation of defendant on 15 September 2016. The State further argued that case law stood for the proposition that defendant is not entitled to elicit testimony from the State's witnesses as to self-serving declarations made by defendant during an interview on a later date about which the State had not questioned the witnesses. The State maintained that, "as long as we don't mention the fact that he was interviewed by New Hanover County sheriff's detectives after his arrest on September 15th, [the defense] cannot – they cannot ask any of our witnesses on cross-examination about that even if we talk about the prior night's interview." After further discussion and disagreement, the parties agreed the State should proceed with its direct examination of Detective Hudson and that the issue would be revisited at a later time when the jury was not waiting.

Before the jury returned to the court room the following morning, the defense made an offer of proof. On *voir dire*, Detective Hudson testified that during the post-arrest interrogation of defendant on 15 September 2016,

[defendant] admitted to what he done and he took us to the location where he took [the juvenile] and tied her to the tree and explained everything, told us on the way there everything that we needed to know as far as getting the locks off and what we needed. He gave us some specific directions exactly to where she was

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Detective Hudson testified that defendant stated he hoped the juvenile was okay and that he was sorry. Upon conclusion of the *voir dire* testimony of Detective Hudson, the defense argued the State's Rule 106 argument was a red herring because this was not a Rule 106 issue. The defense asserted that "[w]hat the State is trying to do is circumvent [defendant's] right to cross-examine this witness" and "[defendant] has a right to ask [Detective Hudson] questions about what happened after he was arrested." The defense explicitly stated it "[was] not trying to admit statements or recording."

Upon hearing the arguments, the trial court ruled the defense could not cross-examine Detective Hudson regarding the post-arrest interrogation of defendant on 15 September 2016. The trial court explained, "I find that the [15 September 2016] interview was a separate interview from the [14 September 2016] interview; and, therefore, I will not allow the defense to ask this witness any questions . . . about the [15 September 2016] interview." The trial court noted the defense's objection, and when the defense questioned Detective Hudson how many times she interviewed defendant, the State's objection was sustained.

The State later called Detective Michael Sorg, who led the surveillance of defendant on the morning of 15 September 2016 until defendant's arrest, as a witness. Upon completion of the State's direct examination, the defense put on an offer of proof. Detective Sorg testified on *voir dire* that, on 15 September 2016, defendant took law enforcement to the location where he left the juvenile. Detective Sorg also testified that defendant stated he was planning to go back to the location to bring the juvenile water. After the *voir dire* testimony, the defense renewed its arguments that the defense should be able to cross-examine the witness regarding the post-arrest interrogation of defendant. In response, the State argued that defendant would be required to take the stand if he wanted the evidence admitted. The State argued the evidence was inadmissible because it was self-serving hearsay and because the post-arrest interrogation on 15 September 2016 was separate from the interview of defendant on 14 September 2016. The trial court again ruled the defense could not cross-examine the State's witness concerning the post-arrest interrogation.

Prior to the defense's cross-examination of Detective Sorg on the third morning of evidence, the defense again requested to question Detective Sorg about defendant taking law enforcement to the location where the juvenile was found. The defense argued that disallowing the evidence would mislead and deceive the jury. The trial court denied the defense's request and explained that, "[m]y understanding based

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upon everything that I heard about that last interview on [15 September 2016], that there's not been any testimony about that last interview by Detective Sorg; therefore, you will not question him about anything that has to do with that interview."

Upon the conclusion of the State's evidence, the issue of the defense presenting evidence regarding the 15 September 2016 post-arrest interrogation of defendant arose again. The State argued the defense could not get around the trial court's prior rulings by calling Detective Sorg as a defense witness. The defense responded that it understood the trial court's prior rulings to exclude testimony of defendant's hearsay statements on cross-examination and explained that it was not seeking to introduce hearsay statements. Nevertheless, the trial court ruled that the defense could not question Detective Sorg on anything related to the post-arrest interrogation of defendant on 15 September 2016. The State reiterated that the testimony was a self-serving statement by defendant, was in a completely different interview, and is hearsay. The State also reasserted its position that "[i]f they want to present evidence about what the defendant said and did during those interviews, [defendant] is going to have to take the stand and testify himself." The trial court agreed and disallowed the defense from questioning Detective Sorg about anything related to the post-arrest interrogation on 15 September 2016. The defense made another offer of proof from Detective Sorg to preserve the issue.

Defendant then took the stand to testify in his own defense. Defendant testified about his post-arrest interrogation on 15 September 2016.

In arguing the trial court erred in disallowing cross-examination of the State's witnesses concerning defendant's post-arrest interrogation on 15 September 2016, defendant first contends the cross-examination should have been allowed under Rule 106 of the North Carolina Rules of Evidence in order to prevent the jury from being misled or deceived by the evidence presented of the 14 September 2016 interview. Defendant's argument is misplaced.

Rule 106 provides that, "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." N.C. Gen. Stat. § 8C-1, Rule 106 (2017). This Court has explained that

Rule 106 codifies the standard common law rule that when a writing or recorded statement or a part thereof

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is introduced by any party, an adverse party can obtain admission of the entire statement or anything so closely related that in fairness it too should be admitted. The trial court decides what is closely related. The standard of review is whether the trial court abused its discretion. The purpose of the “completeness” rule codified in Rule 106 is merely to ensure that a misleading impression created by taking matters out of context is corrected on the spot, because of the inadequacy of repair work when delayed to a point later in the trial.

State v. Thompson, 332 N.C. 204, 219-220, 420 S.E.2d 395, 403-404 (1992) (internal quotation marks and citations omitted).

Below, the State argued, and the trial court determined, the post-arrest interrogation was discrete from the 14 September 2016 interview, from which the State introduced transcripts and recordings. Therefore, the trial court determined Rule 106 did not require the admission of evidence regarding the post-arrest interrogation of defendant.

Defendant argues the trial court erred in this determination because a break in time between the interview on 14 September 2016 and the post-arrest interrogation on 15 September 2016 is not determinative. Citing *Thompson*, 332 N.C. at 220, 420 S.E.2d at 404, defendant contends the trial court should have determined whether the post-arrest interrogation was explanatory or relevant and whether there was a nexus between the prior interviews and the post-arrest interrogation. In *Thompson*, however, the Court held there was no nexus between a prior exculpatory interview that the defendant sought to admit under Rule 106 at the time the State introduced tapes and transcripts of inculpatory telephone conversations between defendant and an informant. *Id.* 220-21, 420 S.E.2d at 404. Thus, the trial court did not abuse its discretion in denying the defendant’s attempt to introduce a transcript of the prior exculpatory interview. *Id.* at 221, 420 S.E.2d at 404. The *Thompson* Court noted, “[i]t was defendant’s responsibility, not the State’s, to introduce evidence about his exculpatory interview.” *Id.* at 220-21, 420 S.E.2d at 404.

Similarly, in *State v. Broghill*, __ N.C. App. __, 803 S.E.2d 832 (2017), *disc. review denied*, 370 N.C. 694, 811 S.E.2d 588 (2018), which defendant also relies on, this Court held the trial court did not err in excluding transcripts of two custodial interviews that the defendant sought to have admitted contemporaneously with a tape and a transcript of a subsequent custodial interview. This Court explained in *Broghill* as follows:

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the trial court correctly applied Rule 106 in its decision to exclude the first two statements at trial. After reviewing all three recorded statements and comparing the contents thereof, the court concluded that defendant made no statement during the first or second interview that under Rule 106 ought, in fairness, to be considered contemporaneously with the statements of April 26. The court found no instance where the statements in the April 26 interview require further explanation by any excerpts from the April 23 or the April 25 interview, and no instance where the statements in the [April 26] interview were rendered out of context or misleading in the absence of excerpts from the April 23 or April 25 interview. Defendant harps on the temporal connection and interrelated nature of the statements but fails to explain precisely how the first two statements would enhance the jury's understanding of the third. And upon our review of the interview transcripts, we conclude defendant has failed to show that the court abused its discretion in excluding defendant's first two statements at trial.

Id. at ___, 803 S.E.2d at 844 (internal quotation marks omitted).

As in *Thompson* and *Broyhill*, there is no nexus between the 14 September 2016 interview of defendant and the 15 September 2016 post-arrest interrogation of defendant that would require evidence of the post-arrest interrogation to explain or add context to the 14 September 2016 interview. Thus, the trial court did not err in determining the 14 September 2016 interview and the 15 September 2016 post-arrest interrogation were discrete. That determination, however, is of no consequence in this case.

By its terms, Rule 106 only applies to the introduction of a "writing or recorded statement" by defendant "which ought in fairness to be considered contemporaneously" with a writing or recorded statement introduced by the State. N.C. Gen. Stat. § 8C-1, Rule 106. The commentary to Rule 106 explains that, "[f]or practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations." See Advisory Committee Notes to Rule 106. The commentary also notes that "[t]he rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case." *Id.*

In both *Thompson* and *Broyhill*, the defendants sought to introduce transcripts of interviews under Rule 106 at the same time that the State

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introduced transcripts and recordings of phone calls, *see Thompson*, 332 N.C. at 219, 420 S.E.2d at 403, and another interview, *see Broyhill*, __ N.C. App. at __, 803 S.E.2d at 838. In contrast to those cases, the defense does not argue that it attempted to introduce a transcript or recording of the post-arrest interrogation at the time the State introduced recordings of the 14 September 2016 interview. The defense explained and put on offers of proof showing that it simply wanted to question the State's witnesses about the post-arrest interrogation of defendant during cross-examination.

Rule 106 neither provides for the admission or exclusion of such testimony during the defense's cross-examination of the State's witnesses in this case.

It is Rule 611 of the North Carolina Rules of Evidence that addresses the scope of cross-examination. The pertinent portion of Rule 611 provides that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b) (2017). Our appellate courts have referred to this rule as "the 'wide-open' rule of cross-examination, so called because the scope of inquiry is not confined to those matters testified to on direct examination." *State v. Singletary*, 247 N.C. App. 368, 374, 786 S.E.2d 712, 717 (2016) (quoting *State v. Penley*, 277 N.C. 704, 708, 178 S.E.2d 490, 492 (1971)). "But, the defendant's right to cross-examination is not absolute." *State v. Guthrie*, 110 N.C. App. 91, 93, 428 S.E.2d 853, 854, *disc. review denied*, 333 N.C. 793, 431 S.E.2d 28 (1993). "[A]lthough cross-examination is a matter of right, the scope of cross-examination is subject to appropriate control in the sound discretion of the court." *State v. Coffey*, 326 N.C. 268, 290, 389 S.E.2d 48, 61 (1990); *see also* N.C. Gen. Stat. § 8C-1, Rule 611. "Absent a showing of an abuse of discretion or that prejudicial error has resulted, the trial court's ruling will not be disturbed on review." *State v. Maynard*, 311 N.C. 1, 10, 316 S.E.2d 197, 202-203, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984), *dismissal of habeas corpus aff'd*, 943 F.2d 407 (1991), *cert. denied*, 502 U.S. 1110, 117 L. Ed. 2d 450 (1992).

Although defendant does not specifically cite Rule 611, defendant does make the argument that testimony regarding his post-arrest interrogation that the defense sought to elicit from the State's witnesses during cross-examination was relevant. We agree. "Relevant evidence" is broadly defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2017). In this case, there is no question

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that the defendant's post-arrest interrogation, during which defendant admitted to the abduction of the juvenile and took law enforcement to the location where he left the juvenile chained to a tree, was relevant. The issue this Court must decide is whether the trial court's exclusion of the relevant evidence was an abuse of discretion.

As shown above in the summary of the defense's attempts to cross-examine the State's witnesses regarding the 15 September 2016 post-arrest interrogation and the State's counter arguments to exclude the testimony, the State argued the cross-examination was improper for a number of reasons, including that the post-arrest interrogation was separate from the interview of defendant on 14 September 2016 for purposes of Rule 106, the testimony the defense sought to elicit included self-serving declarations by defendant, the State had not elicited any evidence about the post-arrest interrogation, and the testimony was hearsay. In denying defendant the opportunity to elicit testimony concerning the post-arrest interrogation from the State's witnesses, the trial court accepted the reasons argued by the State. The court explained at different times that "the [15 September 2016] interview was a separate interview from the [14 September 2016] interview; and, therefore, I will not allow the defense to ask this witness any questions . . . about the [15 September 2016] interview[.]" and "[m]y understanding based upon everything that I heard about that last interview on [15 September 2016], that there's not been any testimony about that last interview by [the witness]; therefore, you will not question [the witness] about anything that has to do with that interview."

When the trial court's reasons for disallowing the defense from cross-examining the State's witnesses regarding the 15 September 2016 post-arrest interrogation is considered in light of the law on Rule 106 and Rule 611, it is clear that the trial court abused its discretion in disallowing the evidence. As determined above, Rule 106 is inapplicable in this case and Rule 611 does not limit cross-examination to those matters raised during direct examination.

Generally, "[e]videntiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001); *see also* N.C. Gen. Stat. § 15A-1443(a) (2017). Defendant, however, argues the error in this case amounted to a violation of his constitutional rights and, therefore, the State must prove the error was harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443(b) (2017) ("A violation of the defendant's rights under the Constitution of the United States is

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prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.”).

We hold the trial court’s error in this case was harmless under either prejudice standard given the overwhelming evidence of defendant’s guilt, *see State v. Harris*, 136 N.C. App. 611, 617, 525 S.E.2d 208, 212 (“ ‘Overwhelming evidence of guilt will render even a constitutional error harmless.’ ”) (quoting *State v. Welch*, 316 N.C. 578, 583, 342 S.E.2d 789, 792 (1986)), *appeal dismissed and disc. review denied*, 351 N.C. 644, 543 S.E.2d 877 (2000), and the fact that the evidence the defense sought to admit on cross-examination was ultimately admitted into evidence, albeit through defendant’s own testimony, *see State v. Durham*, 74 N.C. App. 159, 164, 327 S.E.2d 920, 924 (1985) (“The rule in North Carolina is that where a trial court erroneously refuses to allow cross-examination of a witness, and then the evidence sought to be admitted by cross-examination is admitted later by another witness, the error is harmless.”). Because the jury had the opportunity to consider the overwhelming evidence against defendant, including testimony by those who either witnessed the abduction or saw defendant with the juvenile, testimony by the victim about the abduction and the assault, testimony by law enforcement about the investigation and the rescue of the juvenile from being left chained by the neck to a tree overnight, testimony from medical personnel who examined the juvenile, and testimony by defendant about his post-arrest interrogation on 15 September 2016, and because the jury unanimously found defendant guilty of attempted first degree murder, we hold the defendant was not prejudiced by the trial court’s erroneous rulings limiting cross-examination.

2. MAR

[2] On appeal, defendant also argues that the trial court erred in denying his motion for appropriate relief. We disagree.

“When considering rulings on motions for appropriate relief, we review the trial court’s order to determine ‘whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.’ ” *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). “ ‘When a trial court’s findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court’s conclusions are

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fully reviewable on appeal.’ ” *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (quoting *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998)).

In the MAR filed on 29 September 2017, defendant argued the State erred by failing to allege aggravating factors in the indictments and by failing to narrowly define the aggravating factors. In bringing the MAR, defendant sought to have the sentences for the aggravated offenses vacated and to be resentenced to non-aggravated sentences. The trial court denied defendant’s MAR by order on 13 November 2017.

Defendant does not challenge the trial court’s findings, but instead argues the trial court erred in its application of the relevant law. First, defendant argues that the United States Supreme Court’s decision in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), should apply in this instance and asks this Court to hold for the first time that, “in order to be convicted of an aggravated crime, the indictment must include the element of the aggravated crime.” In *Apprendi*, the Supreme Court held that a New Jersey “hate crime” law that allowed a trial judge to impose an extended term of imprisonment “based upon the judge’s finding, by a preponderance of the evidence, that the defendant’s ‘purpose’ . . . was ‘to intimidate’ [the] victim on the basis of a particular characteristic the victim possessed” violated the Due Process Clause of the Fourteenth Amendment. 530 U.S. at 491, 147 L. E. 2d at 456. The Supreme Court explained that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt” and “[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.” *Id.* at 490, 147 L. Ed. 2d at 455 (internal quotation marks and citations omitted).

Relying on *Apprendi*, defendant argues the aggravation of an offense is “a new, separate, and greater crime” and, therefore, aggravating factors must be alleged in an indictment.

However, our Supreme Court held in *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (2000), that “the Fourteenth Amendment does not require the listing in an indictment of all the elements or facts which might increase the maximum punishment for a crime.” 351 N.C. at 508, 528 S.E.2d at 343. Defendant acknowledges *Wallace*, but seeks to have the issue reconsidered in light of *Apprendi*. We decline to do so as *Apprendi* and *Wallace* are not at odds.

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In North Carolina, N.C. Gen. Stat. § 15A-1340.16 governs aggravated and mitigated sentences and places the burden on the State to prove to a jury beyond a reasonable doubt that an aggravating factor exists if the defendant does not admit to the aggravating factor. *See* N.C. Gen. Stat. § 15A-1340.16(a) and (b) (2017). The statute also contains a list of statutory aggravating factors, *see* N.C. Gen. Stat. § 15A-1340.16(d), and specifically provides that “[a]ggravating factors set forth in subsection (d) . . . need not be included in an indictment or other charging instrument[.]” N.C. Gen. Stat. § 15A-1340.16(a4). Instead, the statute requires that

[t]he State must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section . . . at least 30 days before trial or the entry of a guilty or no contest plea. . . . The notice shall list all the aggravating factors the State seeks to establish.

N.C. Gen. Stat. § 15A-1340.16(a6).

It appears the State complied with the requirements of N.C. Gen. Stat. § 15A-1340.16 in this case. In accordance with N.C. Gen. Stat. § 15A-1340.16(a6), the State filed a written notice of aggravating factors on 22 June 2017, months before trial. That notice informed defendant that the State sought to prove two statutory aggravating factors, that “[t]he offense was especially heinous, atrocious, or cruel[.]” *see* N.C. Gen. Stat. § 15A-1340.16(d)(7), and that “[t]he victim was very young[.]” *see* N.C. Gen. Stat. § 15A-1340.16(d)(11). Pursuant to the procedure for a bifurcated trial set forth in N.C. Gen. Stat. § 15A-1340.16(a1), after the jury convicted defendant of the underlying offenses, the court allowed the State to proceed on the aggravating factors. Upon consideration of the evidence and arguments, the jury found that each offense was especially heinous, atrocious, or cruel and that the victim was very young.

We hold the State complied with N.C. Gen. Stat. § 15A-1340.16 in all respects and that the procedure prescribed by the statute satisfies the mandate in *Apprendi*, that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455.

In addition to defendant’s argument that the aggravating factors should have been alleged in the indictments, defendant argues the trial court erred in denying his MAR because the North Carolina jury instruction issued by the trial court for “heinous, atrocious, or cruel” is unconstitutionally vague. Our Supreme Court, however, has previously

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rejected that argument and held the jury instruction for heinous, atrocious, or cruel provides constitutionally sufficient guidance to the jury. *See State v. Syriani*, 333 N.C. 350, 391-92, 428 S.E.2d 118, 140-41 (1993). We are bound by our Supreme Court's decision.

III. Conclusion

For the reasons discussed, we hold defendant received a trial free from prejudicial error. However, remand is necessary to correct the clerical error in the judgment entered on defendant's conviction for AWDWISL.

NO PREJUDICIAL ERROR; REMAND.

Judge CALABRIA concurs.

Judge MURPHY concurs in result only.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
RODNEY LEE ENOCH, DEFENDANT

No. COA17-1248

Filed 18 September 2018

1. Jury—rehabilitation—noncapital murder trial—trial court's discretion

During jury selection for a noncapital first-degree murder trial, the trial court properly exercised its discretion when it denied defendant's request to rehabilitate certain jurors in order to keep them on the jury, where the trial court stated that rehabilitation was "potentially allow[ed]" but "generally not done" in noncapital cases.

2. Evidence—other crimes, wrongs, or acts—prior abusive relationships—similar patterns of assaults—time gap

In a first-degree murder trial, the testimony of two women regarding their prior abusive relationships with defendant was admissible pursuant to Rule of Evidence 404(b) to show motive, intent, modus operandi, and identity. The murder victim had been in an abusive relationship with defendant and was found stabbed to death in an isolated area, and the two witnesses testified to similar

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patterns of assaults by defendant. A nine-year gap between the assaults and the murder did not render the testimony inadmissible.

3. Appeal and Error—preservation of issues—waiver—objection to limiting instruction on evidence—failure to object to evidence itself

Defendant waived an argument that the trial court erred in his first-degree murder trial by admitting evidence of defendant's prior assaults against the murder victim to show identity, where defendant objected only to the court's limiting instruction to the jury and not to the evidence, its limited admissibility, or its use in proving identity.

4. Evidence—hearsay—exceptions—then-existing mental, emotional, or physical condition—letter concerning assaults by defendant

In a first-degree murder trial, the trial court did not abuse its discretion by admitting a document hand-written by the victim listing things she wanted to tell defendant regarding defendant's assaults upon her, including an assault with frozen meat four months earlier. The trial court reasonably concluded that the document was relevant to show the victim's state of mind around the time of the murder and was not unfairly prejudicial.

5. Evidence—relevance—danger of unfair prejudice—skeletal remains

The trial court in a first-degree murder trial did not abuse its discretion by admitting the skeletal remains of the victim. The remains were relevant and more probative than prejudicial where the skull proved the victim's identity and illustrated the testimony of the hunter who found the remains, the rib bones showed the nature and number of the victim's fatal wounds, and the femur showed the biological item used to establish the victim's identity through DNA testing. Further, defendant failed to show that any prejudice resulted from the alleged error.

Appeal by Defendant from a judgment entered 16 September 2016 by Judge James E. Hardin Jr. in Alamance County Superior Court. Heard in the Court of Appeals 8 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary Carla Babb, for the State.

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Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for Defendant-Appellant.

HUNTER, JR., ROBERT N., Judge.

Rodney Lee Enoch (“Defendant”) appeals from a 16 September 2016 judgment after a jury convicted him of one count of first degree murder. Following the jury verdict,¹ the trial court sentenced Defendant to life imprisonment, without parole. Defendant asserts the trial court erred by: (1) not allowing him to rehabilitate jurors; (2) admitting evidence of two prior abusive relationships; (3) instructing the jury it could use prior assaults on the victim to show identity; (4) admitting an irrelevant and prejudicial document; (5) allowing the victim’s skeleton to be displayed to the jury by denying his mistrial motion; and (6) denying him a fair trial due to cumulative error. We find no prejudicial error.

I. Factual and Procedural Background

On 14 October 2013, an Alamance County Grand Jury indicted Rodney Lee Enoch (“Defendant”) on one count of first degree murder.

A. Jury Selection

On 15 August 2016, the trial court called Defendant’s case for trial, and jury selection began. The State questioned a prospective juror, Terrance Copling. Copling stated he was familiar with Defendant’s family, though he did not know Defendant himself. Copling stated he thought he could be impartial and fair to both sides in the case. When the State later pressed Copling, however, he admitted “having the connection to [Defendant’s] dad or knowing his dad in the past . . . will probably cause issues . . .” The State made a motion to dismiss Copling as a juror for cause. Defendant asked the trial court for leave to rehabilitate Copling, in order to keep him on the jury. The court denied Defendant’s request, and stated “[t]his is not a capital case.” The trial court asked Copling, “Is it your position that due to your knowledge of the defendant’s family that you could not fairly evaluate the evidence presented to you and be impartial to the State and the defendant?” Copling answered in the affirmative. Answering a clarifying question, Copling clearly agreed his feelings were “so strong” he could not be impartial. The trial court allowed the State’s challenge for cause and excused Copling over Defendant’s objection.

1. The record on appeal indicates the Alamance County Clerk of Superior Court could not locate the actual verdict sheet from trial.

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Outside the presence of the prospective jury, the trial court told Defendant he was “not entitled to ask questions to rehabilitate in any fashion[]” because “this [wa]s not a capital case.” Defendant objected and argued, “I don’t think whether it’s capital or non-capital makes any difference.” Defendant also noted he wished to rehabilitate other jurors, but did not “because [he] understood the [c]ourt’s ruling to be that because it’s not a capital case [he] wouldn’t be able to” The court reiterated it had already ruled on the issue, but noted Defendant preserved the issue for the record.

After a brief recess, the trial court stated in pertinent part:

Just so there’s no ambiguity at all on what the [c]ourt ruled upon with respect to the defendant’s last objection regarding the juror Terrance Copling, we were having a conversation but I want to make sure the record is clear as to what the Court’s rationale was for its ruling.

It has long been my understanding that in capital cases the defendant is entitled to rehabilitate jurors on the question of death qualification only and that’s the only provision that I’m aware of that requires and does give the defendant such an opportunity.

As to questioning of jurors when the other party has the juror, it’s long been my belief that the system was designed to at least potentially allow for that but it’s generally not done. In my discretion I chose not to do it because, again, this is not a capital case. The rehabilitation question [is] only allowed – only required in capital cases.

. . . [T]he Court has exercised its discretion and will allow the parties to ask questions when they have the jurors and the other party will not be allowed ask questions during that aspect of the process.

B. Trial Court’s General Findings of Fact

The evidence presented at trial led the court to find the following by a preponderance of the evidence: Debra Dianne Sellars (“Sellars”) was last seen on 20 April 2012. Sellars’ children reported her missing on 24 April 2012. Defendant was Sellars’ on-again, off-again boyfriend. On 16 December 2011, Defendant assaulted Sellars. Defendant pleaded guilty to the assault. On 3 October 2012, a hunter discovered human skeletal remains in a wooded area on the property of 4280 Union Ridge Road, Burlington, North Carolina. DNA analysis confirmed the remains

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belonged to Sellars. Sellars' assailant stabbed her to death and deposited her body at 4280 Union Ridge Road. Defendant objected to the trial court's findings of fact.

C. Testimony at Trial

The State called Chelsea Sellars ("Chelsea"), Sellars' daughter. Chelsea first met Defendant in 2011 when he dated her mother. For a period of time in late 2011, Defendant lived with Sellars, Chelsea, and Sellars' son Deandre Terrell ("Andre"). During that period, Chelsea noticed her mother's "face look[ed] a little different on occasion" due to heavier makeup application. From the time Defendant moved out, sometime in late 2011, to 20 April 2012, Chelsea did not notice her mother interacting with any other men. On 20 April 2012, a Friday, Chelsea got dressed for school, told her mother goodbye, and went to the bus stop at 7:30 a.m. When Chelsea got home from school on Friday around 3:15 p.m., her mother was not home. Over the weekend, Chelsea stayed in her room and played video games. She knew her mother was not home, "but it wasn't unusual for her to be gone over the weekend." On Monday, Chelsea became concerned when her mother still did not come home. On Tuesday, Chelsea went to school and informed her teacher "that [her] mother hadn't returned home over the weekend nor that Monday." The teacher sent Chelsea to the counselor who then contacted the police.²

The State called Andre. While Defendant and Sellars were dating, Andre recalled seeing his mother with a black eye and bruises on her face and neck. Andre later asked his mother if she was still seeing Defendant, and Sellars said "no." Andre suspected his mother still accepted phone calls from Defendant. On 20 April 2012, Andre stayed home from work with his mother. Around 4:00 p.m., Sellars received a phone call. Andre heard Sellars talking to "a male voice" from the other room, and he heard his mother say "that [she] will meet [them] at the hotel." Andre did not recognize the voice as Defendant's. Andre then told his mother he had to be at work the next morning. Sellars said she would be back in the morning so Andre could use the van to get to work. Sellars left around 5:00 p.m. Andre did not see or speak to his mother again. Andre called his mother later the same night to remind her he needed the car for work in the morning. Sellars did not pick up the phone, and she was not

2. Burlington Police Department Officer Dana Mitchell spoke with Chelsea on Tuesday, 24 April 2012. Mitchell immediately called his supervisor because "it didn't seem like a normal missing person kind of case to [him]." Mitchell also entered Sellars' name into the NCIC database as a "missing person."

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home the next morning at 6:00 a.m. when Andre got up for work. Andre continued to call his mother throughout weekend. On Saturday, Sellars' phone rang, and then went to voicemail. On Sunday and Monday, Sellars' phone went straight to voicemail without ringing.

The State called Justin Curtis ("Curtis"), an employee of a car dealership in Greensboro, North Carolina. In 2012, Curtis lived in Burlington, North Carolina, at his parents' house, located next to 4280 Union Ridge Road. In October 2012, Curtis went deer hunting on the land next door. While surveying the land for signs of deer, Curtis saw something with a "bright, cream color" in the woods. Curtis didn't initially realize he discovered human remains. Curtis "pick[ed] up the skull" and took it back to his parents' house, leaving the other remains behind. Curtis then called the Sheriff's Department. When a police officer arrived, with gloves on he picked up the skull and took it to his vehicle. A second officer then arrived with a K-9 unit, and Curtis took the officers to the location of the other human remains. Curtis identified the remains he saw on a photograph displayed for the court.

In *voir dire*, the State indicated it intended to "put some of the remains into evidence." The State explained its "plan was to enter the skull, the ribs, and the femur." The remains were in a box and not individually labeled. The State argued it was "only entering what [it] felt [was] necessary for this trial." Defendant objected to the relevancy and evidentiary value of the skeletal remains, aside from "the four ribs." Specifically, Defendant argued Curtis would not be able to identify the skull as the one he found in the woods. Defendant also argued the State gained nothing from showing the skull, because no expert witness drew any conclusions from it. As to the State introducing the femur as a source of DNA, Defendant argued the actual femur added nothing to previously provided photographs.

The State countered "every single remain" had relevance to the case. Specifically, the State argued the skull was relevant "because that goes with [Sellars] and that also helps identify her and identify her race." Without Curtis' identification of the skull, other witnesses would not be able to identify any of the remains. The trial court determined "403 and 401 [balancing] at this point are premature in my view because [the State's] not going to be moving it into evidence [at this time]." Defendant replied, "Then I have a question about how this witness can [identify the skull] and I would ask that at least the State do it in *voir dire* outside the presence of the jury." At the trial court's allowance, the State then broke the seal on the box during *voir dire*. Curtis identified Sellars' skull "by the two front teeth" as the skull he found

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in the woods. The State then moved to enter the skull into evidence. Defendant again objected to the relevancy of the skull. Defendant also argued the skeletal remains, on the whole, were not necessary to establish the victim's identity because "things were done with that evidence that identified her."

After a brief recess, *voir dire* continued, and Defendant motioned for the Court to release the remains to Sellars' family. Defendant then waived all issues on chain of custody as to the remains. The State argued the court could not release the remains until after trial, because the State needed the evidence to prove its case. The State offered the following reasons to support the relevancy of the skeletal remains:

[T]he jury can look at the side by side comparisons of her photograph to the skull. I'm required to prove that someone died.

Dr. Ann Ross did examine all of the remains used. To determine how she died she had to go through each of the remains. As I mentioned in my opening and as she will testify that she had to go through each of the remains to see if there were any injuries on that.

And in addition, the family, you know, wants me to prove my case. They know that they will get her remains, whatever is left, you know, when the case is over, so they're not requesting those remains at this time. And just as I previously mentioned, you know, all of them would be relevant. They were all found there at the scene at that time.

The trial court found admission of Sellars' skeletal remains into evidence would not be duplicative of photographs on the record. The trial court then held the skull's evidentiary value was "not substantially outweighed by the danger of unfair prejudice[,] and thus "admissible pursuant to Rules 401, 403 and 402."³ After *voir dire*, the State pulled the skull out of the box, and Curtis identified the skull for the jury. Defendant renewed his relevancy objection. The trial court overruled Defendant's objection, and received the skull into evidence.

The State called Dr. Ann Ross, director of the Forensic Sciences Institute at North Carolina State University. The trial court tendered Dr. Ross as an expert in the field of forensic anthropology. Dr. Ross

3. The trial court noted Defendant objected to the skull on the basis of 401 and 403, not on the basis of chain of custody via 402 because Curtis actually recognized the skull.

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conducted trauma analysis on each individual bone of the completely skeletonized remains. Dr. Ross noted only very small bones were missing from the “almost” complete skeleton of the decedent. Dr. Ross then assembled all twelve of Sellars’ left rib bones on a table in front of the jury. Dr. Ross explained the process of “lay[ing] all the remains in [an] anatomical position” so she could “go through everything . . . to see if there [are] fractures or any type of evidence on there” Out of the set of the left twelve rib bones, Dr. Ross noted four were “completely fractured in half.” The fractures were not due to animal activity and indicated four penetrating slits made by a sharp instrument. Dr. Ross concluded the pattern of the cuts on the rib bones was consistent with Sellars being stabbed multiple times with a knife. Dr. Ross then assembled the right rib bones on the table next to the left ribs. She noted animal activity damaged the right rib bones. The trial court then invited the jurors to “without comment . . . step down and see” the bones assembled on the table in front of them. Four out of fifteen jurors stepped down and examined the rib bones. After the trial court noted it “[saw] no further indication that the jurors wish[ed] to see this array of ribs[,]” the court then directed Dr. Ross to put the rib bones back into their packaging.

Outside the presence of the jury, Defendant argued “a distinct odor” filled the courtroom each time the State opened the box of remains. The trial court and Dr. Ross did not notice the odor. Defendant continued to object to the display of Sellars’ bones in the courtroom.

In *voir dire*, Dr. Ross admitted this was her first time displaying the actual bones of a deceased victim in front of a jury. Typically, Dr. Ross used anonymous skeletons of deceased persons, who voluntarily donated their bodies to science, to instruct the jury. Defendant renewed his motion to return the remains to the family, then moved for a mistrial. The court denied both motions.

With the jury back in the courtroom, the State moved the left and right rib bones into evidence. Defendant renewed his objections. The trial court overruled Defendant’s objections, and the court received the ribs into evidence.

The State then brought in a separate hanging anatomical skeleton for Dr. Ross to demonstrate the pattern of injury from another angle. Dr. Ross normally used this hanging skeleton to explain her findings to a jury. Dr. Ross showed the placement of Sellars’ earlier described injuries to the jury, as marked by red stickers on the hanging skeleton.

The State called Dr. Clay Nichols, a medical examiner. Dr. Nichols performed Sellars’ autopsy and concluded Sellars died by four stab

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wounds that struck her left lung and heart. Dr. Nichols declared the death was a homicide.

The State called Dr. George Maha, Associate Vice President and Laboratory Director of the DNA Identification Testing Division of Laboratory Corporation of America in Burlington, North Carolina. The trial court tendered Dr. Maha as an expert witness. At his lab in Burlington, Dr. Maha cut off a piece of the deceased's femur for DNA testing. Dr. Maha's DNA test of the femur revealed a 99.9999% probability the bones belonged to Sellars. The State moved to enter the femur into evidence. The trial court admitted and received the femur into evidence over Defendant's renewed objection.

The State called Brian Phillips ("Officer Phillips"), an officer with the Burlington Police Department. On 16 December 2011, Phillips met Sellars when she came to the police department. Sellars told Phillips "she had just been assaulted by her boyfriend at the time." Sellars identified Defendant as her assailant. She described the incident to Phillips as a "verbal altercation" which resulted in her "getting punched in the face two to three times and then struck on top of her head with a frozen pack of hamburger meat." Based on Sellars' visible injuries, Phillips went to the magistrate and obtained a warrant on Defendant for the assault.⁴ Phillips advised Sellars she could obtain a protective order against Defendant. Phillips noted Sellars seemed "hesitant, reluctant" throughout their conversation. Phillips last saw Sellars at the court date for the assault charge against Defendant. Defendant did not object to this testimony regarding Defendant's previous assault charges.

Outside the presence of the jury, the trial court told Defendant it "would be willing to give a limited instruction if it were requested" on testimony regarding Defendant's previous assaults. The trial court suggested a pattern limiting instruction; Defendant then objected to the court's suggestion. Specifically, Defendant objected to the limiting instruction for purposes of identity and intent. Over Defendant's objection, the trial court instructed the jury as follows:

[E]vidence has been received tending to show that on or about December the 16[th] of 2011, [and] on other non-specified occasions prior to this date, that the defendant, had engaged in assaultive actions against Debra Dianne Sellars. This evidence was received solely for the purposes of showing the identity of the person who committed the

4. Phillips also obtained a warrant for larceny of Sellars' cellphone.

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crime charged in this case, if it was committed; that the defendant had the intent, which is a necessary element of the crime charged in this case; and that the defendant acted with malice, which is a necessary element charged in this case.

If you believe this evidence you may consider it but only for the limited purposes for which it has been received. You may not consider it for any other purpose[.]

The State called Kali Marsh (“Marsh”), former employee of Family Abuse Services (“FAS”). FAS is a nonprofit agency that helps domestic violence victims. On 2 April 2012, Sellars went to FAS seeking to file a protective order against Defendant. Sellars reported to Marsh that on 1 April 2012, Defendant had continuously harassed her over the phone. Sellars also described to Marsh a previous incident the year before. Sellars said in December 2011, Defendant “had physically assaulted her by hitting her, choking her and placing a pillow over her face.” Sellars and Marsh had a short conversation, and Marsh did not have a chance to go over safety planning with Sellars. Marsh did not see Sellars again.

The State called Natalie Snowden (“Snowden”), an investigative analyst with the Criminal Investigation Division of the Burlington Police Department. Snowden determined Defendant’s cell phone records indicated he called Sellars around sixty-six times between 18 April 2012 and 20 April 2012. On 20 April 2012, Defendant called Sellars at 8:35 p.m. After 20 April 2012, Defendant did not call Sellars.

The State then called Shelia Daye (“Daye”), Sellar’s little sister. On 24 April 2012, Daye learned her sister was missing and tried to help the police find her. While looking through Sellars’ belongings, Daye found a handwritten letter. The letter was on loose-leaf paper and was “folded in a book where [Sellars] didn’t want nobody to find it.” The State showed Daye the letter Sellars wrote. Daye recognized Sellars’ handwriting as her sister’s.

Outside the presence of the jury, Defendant argued the letter was not relevant and lacked a proper foundation. The State argued the letter was relevant because it spoke to Sellars’ state of mind before she went missing. The State suggested the jury could infer the date of the letter from its references to Defendant’s assault of Sellars in December 2011. The trial court found the letter relevant due to its “significant internal references” to Defendant’s “assaultive behavior” towards Sellars. The court also found the probative value of the letter significantly outweighed the

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danger of unfair prejudice. The court admitted Sellars' handwritten letter into evidence, and the State published copies of the letter to the jury.

In *voir dire*, the State called Cornelia Crisp ("Crisp"), Defendant's ex-girlfriend with whom he had a son in 1993. Crisp met Defendant in 1989, and shortly thereafter they began dating. After the first year of dating, Defendant "started getting controlling[,] and would "smack" Crisp around. Crisp and Defendant lived together for about seven years. Crisp recalled several times when Defendant hit her in the face while she drove him in her car.

One particular evening, Defendant and Crisp left a club arguing.⁵ Defendant took Crisp "out in the country and dragged [her] out of the car and took [her] out in a field on Union Ridge Road." Defendant proceeded to "jump" on Crisp in the snow and beat her in the head with his fists. Defendant told Crisp "he would kill [her][,]" and "that he could get rid of [her]" so no one would find her. The next day, Crisp went to the doctor after feeling sick and feverish. Crisp then found out from the doctor she was three months pregnant. Crisp noted Defendant took her to "that area" near Union Ridge Road about three times over the course of their relationship, and upon reaching that location, he would drag her out of the car and beat her.

Crisp tried to leave Defendant several times. Defendant would call her job and "pop up" at her friend's house to find her. On several occasions while dating Defendant, Crisp would wake up in the hospital with a black eye and bruises. Crisp did not report the incidents to anyone. Defendant left Crisp when he met Tamara Lewis.

At the close of Crisp's testimony, the trial court asked the State its alleged purposes for Crisp's testimony. The State said, "Some of the purposes include [Defendant's] modus operandi, malice, lack of accident, his motive, his opportunity. . . . His plan, intent, which is the same as malice. Common plan or scheme." Defendant argued the State's alleged purposes were "nothing more than a laundry list." Defendant claimed Crisp's testimony had "nothing to do with Dianne Sellars[,] given the assaults on Crisp occurred about twenty years prior and did not involve a weapon. The State conceded some of Crisp's testimony could stay out, but "the other similarities . . . [were] just too numerous[.]" The trial court delayed ruling on the admission of Crisp's testimony until after it heard Tamara Lewis' testimony for context.

5. Crisp did not recall the exact date of this incident but estimated it happened before her son's birth around 1993.

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The State then called Tamara Lewis (“Lewis”), Defendant’s ex-wife and mother of two of his children. During *voir dire*, Lewis described her marriage to Defendant as “pretty good[,]” until “[t]he abuse” started after her son was born in September 1996. After Lewis told Defendant she wanted a divorce, Defendant “put [her] in a head lock and beat [her] several times in the head” with his fists. Lewis described Defendant as controlling and abusive; when she tried to move away from him he would always follow. Defendant often left bruises and knots on Lewis. One time, after Defendant struck Lewis with a belt, Lewis called the police. He had also choked her. A court sentenced Defendant to domestic violence counseling for the incident.

Lewis moved to a different town to get away from Defendant. In 1999 on Christmas Eve, a roommate brought Lewis and her children back into town to see their father for Christmas. At Defendant’s mother’s house, Defendant told Lewis he wanted her and the children to stay with him at a hotel for the night. Lewis told Defendant she would not stay with him. Defendant did not let Lewis leave and became “aggravated.” Lewis then woke up Defendant’s mother and told her Defendant would not let her leave. Defendant then took the phone off the hook and asked Lewis to go “in the back with him.” Lewis refused. Defendant grabbed Lewis, threw her down on the floor, and stabbed her repeatedly with an ice pick, which injured her eye, neck, ear, and shoulder—all in front of Lewis’s two-year-old son, who tried to pull Defendant off of Lewis. When Defendant went into the kitchen to get a “bigger knife,” Defendant’s mother helped Lewis go out the back door. Lewis ran to her car where her roommate was in the driver’s seat with the car running. Defendant ran out of the front door “with another knife” and chased Lewis to the car. Lewis jumped in the car, and her roommate locked the doors. As Lewis and her roommate started to leave, Defendant “just took the knife that he had and started stabbing the window with it” Lewis described the first “knife” Defendant used to stab her with as “an ice pick,” and described the second “knife” Defendant used as “a bigger carving knife.” Lewis sustained “a couple of nicks on [her] ear and on [her] . . . right shoulder.” Defendant pleaded guilty to one count of assault inflicting serious injury, and one count of second degree kidnapping for the incident.

At the close of Lewis’s testimony, the trial court asked Defendant if he wished to be heard on his objection. Defendant stated, “Nothing that Ms. Lewis talked about is comparable in any way to the crime charged except the – potentially the incident involving the stabbing and Christmas in 1999.” Defendant further argued the December 1999

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incident was possibly generically similar, but not sufficiently similar for admission under Rule 404(b). The State countered that Defendant had a discernable pattern of assault against women he dated, and thus Lewis's testimony showed Defendant's potential motive for attacking Sellars. The trial court found both Lewis and Crisp's testimonies regarding Defendant's "assaultive behavior" more probative than prejudicial, and admissible for 404(b) purposes. Lewis and Crisp then testified in front of the jury, pursuant to the trial court's orders and limiting instructions.

The State rested. Defendant neither testified nor offered evidence; the trial court charged the jury not to let that influence its decision. Defendant moved to dismiss for insufficient evidence, and in the alternative moved for the case to proceed on second degree murder. The trial court denied the motion on each. The jury found Defendant guilty of first degree murder. The trial court sentenced Defendant to life without parole.

II. Standards of Review**A. Trial Court's Discretion Regarding Jury Rehabilitation**

This Court "must defer to the trial court's judgment as to whether the prospective juror could impartially follow the law." *State v. Bowman*, 349 N.C. 459, 471, 509 S.E.2d 428, 436 (1998), *cert. denied*, 527 U.S. 1040, 144 L. Ed. 2d 802 (1999). Accordingly, we review the trial court's decision to not allow Defendant to rehabilitate certain jurors for abuse of discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion."). An abuse of discretion occurs when "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

B. Rule 404(b) Rulings

"When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions." *See* N.C. Gen. Stat. § 8C-1, R. Evid. 404(b) (2017). We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 158-59 (2012). Any potential evidentiary error on appeal is deemed "harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C.

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App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001).

C. Rule 403 Rulings

This Court reviews a trial court's admission of evidence under Rule 403 of the North Carolina Rules of Evidence for abuse of discretion if appellant properly preserved the issue for appeal. *State v. Miles*, 223 N.C. App. 160, 164, 733 S.E.2d 572, 575 (2012) (citing *State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995)); see N.C. Gen. Stat. § 8C-1, R. Evid. 403 (2017). Generally, an issue is properly preserved if the party: (1) makes a timely objection at trial; (2) gives specific grounds for the objection; and (3) obtains a ruling denying the request. N.C. R. App. 10(a)(1) (2017). Specifically, a timely objection requires appellant to object when the evidence is actually introduced at trial. *State v. Snead*, 368 N.C. 811, 816, 783 S.E.2d 733, 737 (2016) (citations omitted). Additionally, appellant must object in the jury's presence. *Id.* at 816, 783 S.E.2d at 737-38 ("An objection 'only during a hearing out of the jury's presence prior to the actual introduction of the testimony' is insufficient.") (quoting *State v. Thibodeaux*, 352 N.C. 570, 581-82, 532 S.E.2d 797, 806 (2000)).

An abuse of discretion occurs when the trial court's ruling is "manifestly unsupported by reason." *State v. Graham*, 200 N.C. App. 204, 207, 683 S.E.2d 437, 440 (2009) (citation omitted). On appeal, appellant "must demonstrate a reasonable possibility that, but for the admission of this evidence, the jury would have reached a different result." *Id.* at 207-08, 683 S.E.2d at 440 (citation omitted); see also *Ferguson*, 145 N.C. App. at 307, 549 S.E.2d at 893.

III. Analysis

Defendant contends the trial court committed the following errors: (1) not allowing Defendant to rehabilitate jurors; (2) admitting evidence of two prior abusive relationships; (3) instructing the jury it could use prior assaults on the victim to show identity; (4) admitting an irrelevant and prejudicial document; (5) allowing the victim's skeleton to be displayed to the jury by denying his mistrial motion; and (6) denying him a fair trial due to cumulative error. Pursuant to Rule 28 of the North Carolina Rules of Appellate Procedure, we do not consider Defendant's cumulative error argument. *State v. Bellamy*, 172 N.C. App. 649, 662, 617 S.E.2d 81, 91 (2005) (holding this Court is not required to consider evidence for cumulative error when appellant sparsely, and sometimes unrelatedly, objects as a continuing objection at trial). We consider Defendant's other five arguments in turn.

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A. Trial Court's Discretion Regarding Jury Rehabilitation

[1] Defendant assigns error to the trial court for not allowing the defense the opportunity to rehabilitate jurors. Defendant contends this action was improper in that it amounted to a “blanket ruling” as to the court’s inability to act. We decline to find such violations.

Our Supreme Court has held “[a] defendant has no right to attempt to rehabilitate jurors, and the trial court is not required to allow a defendant to rehabilitate jurors for cause.” *State v. East*, 345 N.C. 535, 547, 481 S.E.2d 652, 660 (1997) (citing *State v. Burr*, 341 N.C. 263, 281-82, 461 S.E.2d 602, 611 (1995)), *cert. denied*, 517 U.S. 1123 (1996)). “The trial court retains discretion as to the extent and manner of questioning, and its decisions will not be overturned absent an abuse of discretion.” *Id.* at 547, 481 S.E.2d at 660 (citing *State v. Wilson*, 313 N.C. 516, 526, 330 S.E.2d 450, 459 (1985)).

This Court has determined in noncapital cases that a trial court has discretion when considering whether to allow rehabilitation during *voir dire*. See *State v. Jones*, 151 N.C. App. 317, 323, 566 S.E.2d 112, 116 (2002) (*appeal dismissed by State v. Jones*, 356 N.C. 687, 578 S.E.2d 320, 2003 N.C. LEXIS 284 (2003) (*cert. denied by Jones v. North Carolina*, 2003 U.S. LEXIS 5726 (U.S., Oct. 6, 2003) (finding a challenge to a potential juror for cause was supported by her answers in the record, and defendant failed to show further questioning would produce different responses); *accord State v. Crummy*, 107 N.C. App. 305, 323, 420 S.E.2d 448, 458 (1992)).

Here, looking to the totality of the *voir dire*, there is no evidence that the trial court ruled out the possibility of rehabilitation. At first the trial court told Defendant he was “not entitled to ask questions to rehabilitate in any fashion[]” because “this [wa]s not a capital case,” but later the trial court allowed for the possibility of rehabilitation. To the trial court’s questions of prospective juror Copling about his ability to be fair and impartial, based on Copling’s knowledge of Defendant’s family, Copling expressed an inability to follow the law. Defendant also wanted to rehabilitate prospective juror Clapp, believing the State’s questions had confused her and she could follow the law. The trial court overruled the objection “based upon what the Court chose to do in its discretion and excused her for cause.”

Rather than disallowing rehabilitation of any jurors, the court clarified its understanding of the law, explaining rehabilitation was “potentially allow[ed]” but “generally not done” in noncapital cases. That the court disallowed defense counsel’s requests for rehabilitation does not,

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in the absence of other evidence, amount to a de facto “blanket” ruling against all rehabilitation efforts. *See East*, 345 N.C. at 547, 481 S.E.2d at 660-61 (trial court’s correct application of law led to preclusion of all rehabilitation efforts). The trial court properly exercised its discretion in disallowing Defendant’s request to rehabilitate jurors; this assignment of error is therefore overruled.

B. Admission of Testimonial Evidence

[2] Defendant next assigns error to the admission of the testimonies of Cornelia Crisp and Tamara Lewis regarding prior abusive relationships.

Evidence Rule 404(b) provides “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith [but] may . . . be admissible for other purposes[.]” N.C. Gen. Stat. § 8C-1, R. Evid. 404(b) (2017). Our Supreme Court has held Rule 404(b)

states a clear general rule of inclusion of relevant evidence of other crimes, wrongs, or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Evidence considered for admission under Rule 404(b) should be “carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused.” *State v. al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002) (citing N.C. Gen. Stat. § 8C-1, Rule 404(a)). Thus, “the rule of inclusion . . . is constrained by the requirements of similarity and temporal proximity.” *Id.* at 154, 567 S.E.2d at 123.

“When the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value.” *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *sentence vacated on other grounds*, 494 U.S. 1023 (1990)). In order to be sufficient for admission of prior-crimes evidence under Rule 404(b), “similarities between the two incidents need not be ‘unique and bizarre,’ ” but the similarities must tend to support “ ‘a reasonable inference that the same person committed both the earlier and later acts.’ ” *State v. Sneed*, 108 N.C. App. 506, 509-10, 424 S.E.2d 449, 451 (1993) (quoting *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991)).

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Temporal proximity “must be considered in light of the specific facts of each case and the purposes for which the evidence is being offered.” *State v. Hipps*, 348 N.C. 377, 405, 501 S.E.2d 625, 642 (1998), *cert. denied*, 525 U.S. 1180 (1999). “[T]he passage of time between the commission of the two acts slowly erodes the commonality between them[.]” *State v. Jones*, 322 N.C. 585, 590, 369 S.E.2d 822, 824 (1988). Further, “where the perpetrator’s identity [i]s in question,” there must be “significant similarities and little passage of time between incidents.” *State v. Scott*, 318 N.C. 237, 247, 347 S.E.2d 414, 420 (1986).

When evaluating temporal proximity, the passage of time during which acts occurred should be considered as a whole rather than as individual incidents. In *State v. Frazier*, for example, defendant objected to the trial court’s admission of testimony, where there was a period of prior sexual abuse against multiple victims spanning twenty-six years, and ending seven years before the crime of sexual abuse at issue in the trial. 344 N.C. 611, 615, 476 S.E.2d 297, 300 (1996). The Supreme Court explained the “testimony in question tended to prove that defendant’s prior acts of sexual abuse occurred continuously over a period of approximately twenty-six years and in a strikingly similar pattern.” *Id.* at 616, 475 S.E.2d at 300; *see also State v. Shamsid-Deen*, 324 N.C. 437, 447, 379 S.E.2d 842, 848 (1989) (holding no error for trial court to admit testimony of prior sexual misconduct occurring during a twenty-year period); *State v. Penland*, 343 N.C. 634, 644, 472 S.E.2d 734, 735 (1996), (*cert. denied*, 519 U.S. 1098 (1997) (holding ten-year span between crimes charged and prior bad acts did not render the evidence so remote in time as to negate the existence of a common plan or scheme)).

Before admitting the respective testimonies, the trial court conducted a *voir dire* hearing pertaining to Defendant’s assaults on the two women. Crisp’s *voir dire* hearing testimony and trial testimony were similar, yet during *voir dire* she was less clear about certain sequential and road location specifics. During *voir dire*, Crisp told the court about several incidents of abuse. Crisp testified that during all three incidents, Defendant was “[a]ngry, . . . [v]ery upset.” Lewis’ *voir dire* hearing testimony and trial testimony were substantially similar.

The trial court ruled certain assaults on Crisp were admissible, and certain assaults on Lewis were admissible. The trial court entered two separate detailed orders concluding Crisp and Lewis’ testimonies were admissible under Rule 404(b) for the purpose of showing identity, malice, intent, motive, and *modus operandi*, and the evidence should not be excluded under Rule 403. The trial court also overruled Defendant’s objections. Through a limiting instruction on Crisp and Lewis’ testimony,

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the court excluded evidence of “generalized conflict[s]” between Defendant and the women.

Here, substantial evidence of similarity among the prior bad acts and the crime charged exists. The trial court’s factual findings show similarities in Defendant’s actions as to all three women. The assaults on Crisp and Lewis were similar to the one perpetrated on Sellars in 2011. Defendant’s assaults on Crisp were similar to those resulting in Sellars’ murder. In both instances, the domestic relationship was violent.

The trial court’s findings of fact identified comparative location similarities between the prior crimes evidence of Defendant’s activities with Crisp and Lewis. Defendant drove Crisp in her car and hit her in the head with his fist. He dragged Crisp out of her car and across a field through high grass, then assaulted her, hitting her in the head and kicking her. In another incident, Defendant likewise dragged Crisp out of the car and beat her. Although Crisp had some difficulty identifying which specific acts occurred at which specific locations, Defendant assaulted her in isolated locations in Alamance County. The area was also isolated where Defendant drove around with Lewis when he was angry. Although no evidence showed Defendant took Sellars, while alive, to isolated locations on multiple occasions, Sellars’ remains were found on one of the roads in an isolated area where Defendant drove, dragged, and assaulted Crisp. Evidence showed Sellars’ body had been dragged through brush before being left there.

Defendant’s argument that Lewis’ stabbing with an ice pick was merely “a very generic similarity,” insufficient for admission per Rule 404(b), fails. Though Defendant claims “there were no features common to the ice pick/knife incident,” an inference is reasonable that the same person committed both the earlier and later acts. Defendant stabbed Lewis when he became angry; he admitted to police he knew where to “poke” Lewis without killing her.

Although the exact nature of Sellars’ killing was unknown, the evidence surrounding Sellars’ death is admissible to prove Defendant’s identity. On the last night Sellars was seen with Defendant, he had rented a hotel room. After Sellars decided she would not go with him, she was stabbed to death with a knife. By Defendant’s own admission about Lewis, he would know exactly where to stab Sellars to kill her.

Defendant also asserts a lack of evidence showing the motive and cause of Sellars’ murder was anger and control. In all three of Defendant’s relationships pertinent to this case, however, assaults and harmful behaviors were triggered by anger, control, and conflict. It is

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reasonable to infer such issues motivated and caused Defendant to murder Sellars.

Evidentiary similarities indicate both Lewis and Crisp's testimony is relevant to show intent and motive, and indicate the same person, Defendant, committed the prior assaults on Crisp and Lewis, and Sellars' murder. On this basis, the evidence was properly admitted.

Defendant contends there were "no 'striking similarities' between the prior acts" and Sellars' death, and such "remoteness of the prior acts weighs heavily in favor of exclusion." Supporting his argument, Defendant relies on *State v. Jones*, 322 N.C. 585, 591, 369 S.E.2d 822, 825 (1988) (holding a seven-year gap between assaultive sexual abuse incidents made the prior crimes inadmissible as proof of common scheme or plan, despite considerable similarities between the prior crimes and the charged crimes) and *State v. Shane*, 304 N.C. 643, 656 285 S.E.2d 813, 821 (1982) (holding even though there was a "striking similarity" between prior and current sexual offense acts, the seven months between the prior act and the crimes charged "substantially negated the plausibility of the existence of an ongoing and continuous plan to engage persistently in such . . . activities").

In *State v. Hippy*s, defendant argued the prior crime, a second-degree murder that occurred in 1978, was too remote in time to be relevant to any aspect of the murder for which he was being tried. 348 N.C. 377, 403, 501 S.E.2d 625, 641 (1998), *cert. denied*, 525 U.S. 1180 (1999). Defendant maintained the error was prejudicial since the jury likely used the evidence for improper purposes. *Id.*, 348 N.C. at 403, 501 S.E.2d at 641; *see* N.C. Gen. Stat. § 8C-1, Rule 404(b). Since the time lapse between the prior crime and the crime charged was seventeen years, defendant argued it was too remote to be admissible under Rule 404(b). The Supreme Court explained, "[r]emoteness for purposes of 404(b) must be considered in light of the specific facts of each case and the purposes for which the evidence is being offered . . . [f]or some 404(b) purposes, remoteness in time is critical to the relevance of the evidence for those purposes; but for other purposes, remoteness may not be as important." *Id.*, 348 N.C. at 403, 501 S.E.2d at 641; *see* N.C. Gen. Stat. § 8C-1, Rule 404(b). The Court further explained "time may be significant" when introducing prior-crime evidence to show "both crimes arose out of a common scheme or plan," but "remoteness is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident." *Id.*, 348 N.C. at 403, 501 S.E.2d at 641. The *Hippy*s Court concluded the "time lapse between the crimes goes to the weight of evidence, not to its admissibility." *Id.*, 348 N.C. at 403, 501 S.E.2d at 641.

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Here, the evidence of prior crimes was admitted to show motive, intent, modus operandi, and identity. The testimony tended to show Defendant's assaults on Crisp occurred from 1990-1993, and those on Lewis from 1996-1999. Sellars' death in 2012 leaves an apparent stretch of approximately thirteen years. Both the State and Defendant agreed to subtract the four years Defendant spent in prison from calculating the passage of time between assaults, resulting in an apparent nine-year gap. The assaults on multiple victims over time, with relatively short gaps in between, show a pattern of behavior. In *voir dire*, Crisp testified as to her belief that she was able to leave Defendant because he met Lewis—his next victim. We conclude, considering the similarities and pattern of assaults, the time lapse between Defendant's assaults on Crisp and Lewis and Sellars' murder was temporal enough to justify admissibility.

Defendant also argues Crisp and Lewis' testimonies provided only a "slight" value when compared to the "substantial prejudice engendered by the testimony," in violation of Evidence Rule 403. Assuming without deciding this issue is preserved, the argument lacks merit. Demonstrating the weighing of evidence under the Rule 403 balancing test, the trial court conducted a *voir dire* hearing, heard arguments from the parties, limited the admission of Lewis and Crisp's testimony, entered a detailed order, and gave limiting instructions. Given the similarity of the assaults, our view that the lapse in time was not so great as to limit the admissibility of evidence, and the overwhelming evidence against Defendant, we find no error in the admission of Crisp and Lewis' testimony and no abuse of discretion.

C. Admission of Prior Assaults to Show Identity

[3] Defendant next assigns error to the trial court's instructing the jury it could use evidence of prior assaults on Sellars to show identity. According to Defendant, the evidence was irrelevant and inadmissible under Rule 404(b) for that purpose and only showed his violent propensity.

Multiple trial witnesses testified regarding Defendant's abuse of Sellars, prior to her murder, including the December 2011 assault she reported to Officer Phillips. At trial, Defendant did not object to the testimony, but stated outside the presence of the jury that the evidence was admissible only to show malice. Following Officer Phillips' testimony, and after being prompted by the trial court, Defendant requested a limiting instruction. The State requested the trial court include in the instruction intent, motive, malice, and identity, among others, so that evidence of Defendant's assaults on Sellars could be considered. The

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trial court ruled the evidence was relevant to show identity, intent, and malice, and it passed the Rule 403 balancing test. Defendant objected to identity and intent. The trial court then entered an order overruling Defendant's objection.

Defendant argues there is a dissimilarity of assault evidence from the charged crime that would make jurors make an impermissible inference that because Defendant assaulted Sellars, he is a violent person and must have killed her.

Defendant objected to the limiting instruction, but not to the evidence, its limited admissibility, or its use in proving identity. His argument on appeal is thus waived. *See* N.C. R. App. P. 10(a)(1). Even if preserved, Defendant's argument is meritless, and any error was not prejudicial. Sufficient similarities exist here to infer Defendant was the perpetrator of both the prior crimes and the charged offense. *See* N.C. Gen. Stat. 8C-1, R. Evid. 404(b); *see also Stager*, 329 N.C. at 304, 406 S.E.2d at 890-91. Defendant's prior assaults and the murder for which he was on trial involved the same victim, Sellars. They arose in the context of the exact same relationship, one in which Defendant used violence to control Sellars' behavior. Defendant harassed Sellars, calling her several times a day during the week before the murder. During the afternoon of her disappearance, Andre heard Sellars talking to a man over the telephone about meeting at a hotel. Defendant admitted Sellars ultimately decided against that meeting. Similarities were sufficient to infer Defendant perpetrated both the prior assaults on Sellars and her murder. The trial court properly admitted evidence of Defendant's prior assaultive behavior toward Sellars for the purpose of showing identity.

On appeal, Defendant did not argue that the other purposes for which the trial court instructed the jury it could consider his prior assaults on Sellars—intent, motive, and malice—were improper. Given the overwhelming evidence against Defendant, there is no prejudice. *See* N.C. Gen. Stat. § 15A-1443(a).

D. Admission of Handwritten Document

[4] Defendant argues the trial court erred by admitting an “irrelevant and overly prejudicial document” written by Sellars. Defendant asserts the document references past events that are inadmissible under Rule 803(3). N.C. Gen. Stat. § 8C-1, R. Evid. 803(3) (2017).

Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable

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or less probable than it would be without the evidence.” Whether evidence is relevant is a question of law, thus we review the trial court’s admission of the evidence *de novo*. Defendant bears the burden of showing that the evidence was erroneously admitted and that he was prejudiced by the error.

State v. Kirby, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010) (citations omitted). “Evidence tending to show the victim’s state of mind is admissible so long as the victim’s state of mind is relevant to the case at hand.” *Stager*, 329 N.C. at 314, 406 S.E.2d at 897 (citation omitted).

Under Rule 403, “relevant [] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.C. Gen. Stat. § 8C-1, R. Evid. 403. Rule 803(3) provides “[a] statement of the declarant’s then existing state of mind” is admissible as an exception to the hearsay rule, but not “a statement of memory or belief to prove the fact remembered or believed[.]” N.C. Gen. Stat. § 8C-1, R. Evid. 803(3).

The handwritten document at issue contained a list of things Sellars was going to tell Defendant. Defendant objected to the admission of the document, outside the presence of the jury, based on lack of foundation and relevance. Defendant claims it is irrelevant as to Sellars’ state of mind on or about the time of Sellars’ death, because there was an approximate four month period of time between the reference to Defendant hitting Sellars with frozen meat on 16 December 2011 and Sellars’ disappearance on or about 20 April 2012. Supporting the argument that the document references past events, Defendant relies on *State v. Hardy* for the proposition that certain statements in Sellars’ letter are “merely a recitation of facts which describe various events,” as opposed to “statement[s] of [the victim’s] then existing state of mind[.]” See *State v. Hardy*, 339 N.C. 207, 228, 451 S.E.2d 600, 612 (1994). According to Defendant, the State’s presentation of the letter was meant solely to be prejudicial. A trial court’s ruling will be reversed on appeal, however, “only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision.” *Kirby*, 206 N.C. App. at 457, 697 S.E.2d at 503 (citation omitted).

Assuming without deciding Defendant’s argument is preserved, we find his argument without merit. The statements in the letter far exceed a mere recitation of events. The document references a time frame as to

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Defendant hitting Sellars on the head with frozen meat, which occurred on 16 December 2011. Moreover, the document reflected Sellars was “choked,” had her “air cut[] off,” “begged for [her] life, and was without “heat in the middle of winter,” statements from which a trial court could reasonably determine the documents showed her state of mind. Defendant presents no evidence this is not a reasonable conclusion nor that the trial court abused its discretion in any way. Defendant’s assignment of error is, therefore, without merit, and the trial court did not err.

E. Admission of Skeletal Remains

[5] Defendant also assigns error to the trial court’s admission of Sellars’ skeletal remains. First, Defendant claims the trial court erred in admitting the evidence under Rule 403, because Sellars’ skeletal remains were more prejudicial than probative. Second, Defendant claims the trial court violated his due process rights by allowing repetitive display of the bones to the jury. Lastly, Defendant claims the trial court erred by denying his mistrial motion. We consider only the first claim, because it is the easiest burden for Defendant to meet. If Defendant cannot prove the trial court abused its discretion in admitting the evidence generally under 403 balancing, then he logically cannot meet the plain error standard of a due process claim. Additionally, the mistrial motion is moot if the court properly admitted the evidence under Rule 403 as more probative than prejudicial.

Rule 403 of the North Carolina Rules of Evidence states relevant “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.C. Gen. Stat. § 8C-1, R. Evid. 403. “ ‘Unfair prejudice’ means an undue tendency to suggest a decision on an improper basis, usually an emotional one.” *State v. Hennis*, 323 N.C. 279, 283, 372 S.E.2d 523, 526 (1988) (quoting *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986)). When reviewing a trial court’s Rule 403 evidentiary ruling, we generally give great deference to the “sound discretion” of the trial court. *State v. Graham*, 200 N.C. App. 204, 207, 683 S.E.2d 437, 440 (2009) (quoting *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990)) (quotation marks omitted). Thus, evidence that illustrates witness testimony is generally found to be competent so long as its relevant. *See State v. Lloyd*, 354 N.C. 76, 100, 552 S.E.2d 596, 615 (2001) (holding admission of victim’s bloody clothing was not unduly prejudicial because it was relevant).

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Sellars' skull, left ribs, right ribs, and right femur were offered and admitted into evidence at different points during the State's case in chief. Defendant properly objected to each individual bone at the appropriate time, and thus we review for an abuse of discretion.⁶

Defendant argues the State submitted Sellars' skeletal remains into evidence "to excite the sympathies or to inflame the passions of the jury." North Carolina case law suggests if the only effect of evidence is to excite prejudice or sympathy, then the trial court abused its discretion when it admitted such evidence. *See e.g., State v. Simpson*, 299 N.C. 335, 346, 261 S.E.2d 818, 825 (1980) (holding trial court erred in admitting during a murder trial evidence that defendant sodomized a dog). In order to determine whether the admission of Sellars' skeleton only excited prejudice and sympathy, we consider the State's purported rationale for each contested set of bones. If there is an established relevant reason for each, we generally defer to the trial court's discretion on relevancy. *See White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

First, we consider the trial court's admission of Sellars' skull. The trial court's admission of a homicide victim's skull is an issue of first impression for this Court.⁷ Generally, evidence used to identify a victim is relevant and admissible at trial. *State v. Eason*, 328 N.C. 409, 421, 402 S.E.2d 809, 814-15 (1991) (holding no error to admit victim's little finger into evidence when used to identify charred victim). In *State v. Williams*, this Court held physical evidence of "a segment of skin from the victim's right leg bearing a tattoo design of a Cobra" was not overly prejudicial and properly established the identity of the victim. 17 N.C. App. 39, 43, 193 S.E.2d 452, 454 (1972), *cert. denied*, 282 N.C. 675, 194 S.E.2d 155 (1973). The Court concluded defendant's argument "that the segment of skin should have been photographed and the photograph

6. Though Defendant's original objection was to admission of the various remains on the whole in *voir dire*, Defendant renewed his objection when the trial court admitted each piece into evidence in front of the jury. Defendant also received a ruling from the trial court for each item.

7. In a case where defendant was tried for being an accessory to crimes of disturbing graves, this Court found no error where the trial judge allowed skulls to be admitted, over defense counsel's objection, to show the object offered was the same as the object involved in the incident giving rise to the trial. *State v. Lewis*, 58 N.C. App. 348, 351-52, 293 S.E.2d 638, 641 (1982). A review of caselaw in other jurisdictions reveals skulls have been deemed properly admitted to show identity and injuries, *see e.g., State v. Cazes*, 875 S.W. 2d 253, 263 (1994) (*reh'g denied* April 4, 1994); type and location of injury and to corroborate expert testimony, *see e.g., Larmon v. State*, 81 Fla. 553, 555, 88 So. 471, 471 (1921); and condition of the skull, *see e.g., Texas & P. Ry. Co. v. Williams*, 200 S.W. 1149, 1151 (1918).

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used as evidence so as to minimize adverse effect on the jury[]” was without merit. *Id.* at 43, 193 S.E.2d at 455.

In the instant case, the State claimed the skull proved the victim’s identity and race. The State further argued it needed Curtis, the hunter who found the skull, to identify it so other witnesses could later identify other pertinent bones. Curtis positively identified the skull as the one he found, based on its two front teeth. Defendant waived all chain of custody arguments, so we assume the skull established a chain of custody to bring in the other pertinent remains to prove the State’s case. As in *Williams*, where a segment of skin from the victim’s right leg was not overly prejudicial, *see* 17 N.C. App. at 43, 193 at 454, here the admitted skull was relevant to the State’s case and illustrated Curtis’ testimony. Though we may have found other means of establishing Sellars’ identity sufficient, the admission of the skull was more probative than prejudicial and properly admitted under Rule 403. *See* N.C. Gen. Stat. § 8C-1, R. Evid. 403.

Next, we consider the admission of the rib bones. Evidence showing the nature and number of a victim’s wounds is sufficiently probative under our case law. *State v. Hager*, 320 N.C. 77, 82-83, 357 S.E.2d 615, 618 (1987) (stating “the nature and number of the victim’s wounds is also a circumstance from which premeditation and deliberation can be inferred”) (citation omitted); *see also State v. Austin*, 320 N.C. 276, 295, 357 S.E.2d 641, 653 (1987) (concluding nature and number of victims’ multiple gunshot wounds showed premeditation). Here, the State used the rib bones to illustrate Sellars’ injuries, which the medical examiner later concluded caused her death. Accordingly, the rib bones were more probative than prejudicial and properly admitted under Rule 403. N.C. Gen. Stat. § 8C-1, R. Evid. 403.

Lastly, we consider the admission of the femur. Biological items used in DNA testing are generally admissible in North Carolina under North Carolina General Statute section 8C-1, Rule 702(a). *State v. Williams*, 355 N.C. 501, 553-54, 565 S.E.2d 609, 640 (2002). Our Supreme Court has held DNA evidence is highly probative under Rule 403. *State v. Daughtry*, 340 N.C. 488, 512, 459 S.E.2d 747, 759 (1995). Here, the State used the femur to establish the identity of the deceased through DNA testing. Accordingly, the femur was highly probative and properly admitted under Rule 403. N.C. Gen. Stat. § 8C-1, R. Evid. 403.

In light of the bones’ relevancy, we conclude the trial court did not abuse its discretion in admitting Sellars’ skeletal remains into evidence and publishing them to the jury. *See Quedens v. State*, 280 Ga. 355, 629

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S.E.2d 197 (2006) (The Supreme Court of Georgia concluded admitting skeletal remains of the victim into evidence, and publishing the skeleton to the jury, was not overly prejudicial in a murder trial.). We ultimately defer to the trial court's discretion because Defendant failed to show prejudice. *See State v. Graham*, 200 N.C. App. 204, 207-08, 683 S.E.2d 437, 440 (2009) (citing *State v. Hennis*, 323 N.C. 279, 287, 372 S.E.2d 523, 528 (1988)). Defendant did not prove that had the skeletal remains not been admitted, a reasonable possibility existed the jury would have reached a different result. *Id.* at 207-08, 683 S.E.2d at 440. Because we find no prejudicial error in the trial court's admission of Sellars' remains, Defendant's remaining claims on this topic are moot.

IV. Conclusion

For the reasons stated herein, we hold Defendant has not shown prejudicial error.

NO PREJUDICIAL ERROR.

Judges ELMORE and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
ERNEST RAYSEAN GRAY, DEFENDANT

No. COA17-1162

Filed 18 September 2018

**Homicide—identity of perpetrator—relevant circumstances—
motive and opportunity—sufficiency of evidence**

The State presented sufficient physical evidence and testimony regarding defendant's motive and opportunity from which the jury could reasonably infer he was the person who fatally shot the victim, or that he was present when the victim was shot, to overcome defendant's motion to dismiss his charges for first-degree murder and discharging a weapon into an occupied dwelling.

Appeal by defendant from judgments entered 16 March 2017 by Judge Douglas B. Sasser in Bladen County Superior Court. Heard in the Court of Appeals 7 June 2018.

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Attorney General Joshua H. Stein, by Assistant Attorney General Kenneth A. Sack, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

BERGER, Judge.

On March 16, 2017, a Bladen County jury convicted Ernest Raysean Gray (“Defendant”) of first-degree murder and discharging a weapon into an occupied dwelling, and he was sentenced to life in prison without parole. Defendant asserts that the trial court erred when it denied his motion to dismiss both charges because the State had not introduced sufficient evidence to establish that he was the perpetrator of the crimes. We disagree.

Factual and Procedural Background

In October 2014, Malcolm Jerome Melvin (“Melvin”) was living in a mobile home park in Elizabethtown, North Carolina, with his girlfriend, Danielle Purdie (“Purdie”). On October 28, 2014, around 1:15 a.m., Melvin saw a Facebook message from Defendant on Purdie’s phone. Melvin responded to the message, both identifying himself and questioning why Defendant was messaging his girlfriend. Defendant responded with another message that said, “Wassup doh [expletive] y u inbox back doh . . . I’m sayn wess up [expletive] wat up want beef now I’m down wit dat.”

After discussing the messages with Melvin, Purdie went back to sleep, but awoke to a knock at the door at about 2:30 a.m. Melvin retrieved his pistol from a closet and went to the front door. Purdie remained in the bedroom. From the bedroom, Purdie could hear voices, but she could not identify the individuals at the door. A person at the door said, “Wass up doh? Wass up? You want beef?” Purdie then heard a gunshot, saw Melvin fall to the floor, and heard more gunshots. Purdie ran to Melvin, but he was not breathing and had no pulse.

Angela Locklear (“Locklear”) and Stephen Johnson (“Johnson”), Defendant’s uncle, lived in a mobile home that was located about 220 feet from Melvin’s residence. On October 28, 2014, between 1:00 a.m. and 2:00 a.m., Locklear heard gunshots. Shortly thereafter, Defendant knocked on their door and asked to speak with his uncle. Locklear testified that Defendant “looked like somebody was after him or something . . . he act[ed] like he was scared.” Defendant told Johnson he did

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not know anything about the gunshots. Defendant then fell asleep in their home.

Around 6:00 a.m. the following morning, Twasjay Brown (“Brown”) knocked on Locklear and Johnson’s door, looking for Defendant. Johnson asked Brown whether he or Defendant had anything to do with the events that occurred during the night. Brown denied any involvement. Defendant and Brown then left the residence.

When deputies with the Bladen County Sheriff’s Department began investigating Melvin’s death on October 28, 2014, they found a wallet, with a driver’s license and social security card belonging to Defendant, on the ground between Melvin’s residence and Johnson’s residence. A cell phone belonging to Brown was also found in the front yard of Melvin’s residence, next to .45 caliber shell casings. Both .45 caliber and 9mm shell casings were recovered from the front yard of Melvin’s residence. There were several bullet holes on the exterior of the residence near the front door, as well as several bullet holes inside of the entrance, where investigators recovered a .45 caliber bullet. Melvin’s pistol was located inside his residence and had not been fired. Melvin’s cause of death was determined to be a gunshot wound to the head. The weapon used to kill Melvin was never recovered.

Defendant was indicted for first-degree murder and discharging a weapon into an occupied dwelling. At trial, Defendant moved to dismiss both charges at the close of the State’s presentation of evidence, and the motion was renewed at the close of all the evidence. Both of Defendant’s motions were denied. Defendant was found guilty of first-degree murder and discharging a weapon into an occupied dwelling, and sentenced to life imprisonment without parole. Defendant gave timely notice of appeal.

Standard of Review

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). “Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

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In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 378-79, 526 S.E.2d at 455 (*purgandum*¹).

Analysis

In North Carolina, a death that is the result of a “felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree.” N.C. Gen. Stat. § 14-17(a) (2017).

The elements of felony murder are (1) that a defendant, or someone with whom the defendant was acting in concert, committed or attempted to commit a predicate felony under N.C. Gen. Stat. § 14-17(a) (2013); (2) that a killing occurred in the perpetration or attempted perpetration of that felony; and (3) that the killing was caused by the defendant or a co-felon.

State v. Maldonado, 241 N.C. App. 370, 376, 772 S.E.2d 479, 483-84 (*purgandum*), *appeal dismissed, disc. review denied*, ___ N.C. ___, 776 S.E.2d 196 (2015). Shooting into an occupied dwelling is a qualifying

1. Our shortening of the Latin phrase “*Lex purgandum est*.” This phrase, which roughly translates “that which is superfluous must be removed from the law,” was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

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predicate felony for felony murder pursuant to Section 14-17(a). *State v. Wall*, 304 N.C. 609, 613, 286 S.E.2d 68, 71 (1982).

When evidence of whether the defendant was the perpetrator of the crime is circumstantial, “courts often [look to] proof of motive, opportunity, capability, and identity to determine whether a reasonable inference of the defendant’s guilt may be inferred or whether there is merely a suspicion that the defendant is the perpetrator.” *State v. Hayden*, 212 N.C. App. 482, 485, 711 S.E.2d 492, 494 (2011) (citation and quotation marks omitted). “The evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury.” *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988).

As this Court explained before in *State v. Lowry*:

The real problem lies in applying the test to the individual facts of a case, particularly where the proof is circumstantial. One method courts use to assist analysis is to classify evidence of guilt into several rather broad categories. Although the language is by no means consistent, courts often speak in terms of proof of motive, opportunity, capability and identity, all of which are merely different ways to show that a particular person committed a particular crime. In most cases these factors are not essential elements of the crime, but instead are circumstances which are relevant to identify an accused as the perpetrator of a crime. . . .

While the cases do not generally indicate what weight is to be given evidence of these various factors, a few rough rules do appear. It is clear, for instance, that evidence of either motive or opportunity alone is insufficient to carry a case to the jury. On the other hand, when the question is whether evidence of both motive and opportunity will be sufficient to survive a motion to dismiss, the answer is much less clear. The answer appears to rest more upon the strength of the evidence of motive and opportunity, as well as other available evidence, rather than an easily quantifiable ‘bright line’ test.

State v. Lowry, 198 N.C. App. 457, 466, 679 S.E.2d 865, 870-71 (2009) (*purgandum*).

Here, the State introduced evidence tending to establish both motive and opportunity. First, motive tended to be sufficiently established with testimony concerning the hostility that existed between Defendant and

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Melvin over Defendant's communication with Purdie. Although Purdie did not see the individuals and was unable to identify their voices, the evidence tended to show that similar, distinctive language had been used both in the message sent by Defendant and by the person speaking with Melvin at the time he was shot. Both communications were about a perceived "beef" between Defendant and Melvin over Defendant's interactions with Purdie. The Facebook message, which could be affirmatively attributed to Defendant, along with the fact that a speaker using similar language came to Purdie's home to confront Melvin with a weapon, evidenced some hostility between Defendant and Melvin of the kind that would precipitate an intentional killing. This is sufficient for a reasonable juror to conclude Defendant had motive to kill Melvin.

Second, Defendant's opportunity to commit the crimes tended to be sufficiently established by both physical evidence at the crime scene and testimony of those who interacted with Defendant near the scene shortly after Melvin's death. Defendant's wallet containing his identification and social security cards was found near Melvin's residence. Shortly after gunshots were heard, Defendant knocked on the door of Locklear's residence, which was located near Melvin's residence. Brown's cell phone was also recovered near the crime scene, and Brown attempted to locate Defendant shortly after the gunshots had been heard. Because the evidence placed Defendant at or near the scene of the crime around the time of the victim's murder, a reasonable juror could find that Defendant had the opportunity to commit the felony that resulted in Melvin's death.

Finally, it is undisputed that, regardless of who fired a weapon into Purdie's residence, an occupied dwelling, it resulted in Melvin's death. The shots Locklear heard in the mobile home park that night came from outside Melvin's residence. Although there were two weapons fired, based on the shell casings found at the scene, "[i]t is not necessary to support a conviction of felony-murder that defendant actually inflicted the fatal shot." *State v. Peplinski*, 290 N.C. 236, 240, 225 S.E.2d 568, 571 (1976). When "several persons aid and abet each other" and one "fatally wounds the victim, all being present, each is guilty of murder in the first degree." *Id.* at 240-41, 225 S.E. 2d at 571. The State's evidence tended to show that Brown had come to Locklear's residence to meet with Defendant shortly after Melvin's death. Moreover, Defendant's wallet containing his identification and social security cards, along with Brown's iPhone, were found at the crime scene. The evidence tended to show that either Defendant or Brown likely fired the fatal shot. Regardless of who actually fired the fatal shot, however, Defendant could still be found guilty of felony murder.

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As our Supreme Court held,

[i]f the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, *then it is for the jury to decide* whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (emphasis added). Based upon the evidence introduced by the State, there was sufficient evidence from which a reasonable inference of Defendant's guilt could be drawn. The trial court did not err in denying Defendant's motion to dismiss, and the jury's verdict will not be disturbed by this Court.

Conclusion

The trial court did not err in denying Defendant's motion to dismiss because the State introduced substantial evidence of each essential element of both discharging a weapon into an occupied dwelling and felony murder. Defendant received a fair trial, free from error.

NO ERROR.

Judges DIETZ and TYSON concur.

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STATE OF NORTH CAROLINA

v.

DAMIEN AARON WHITE, DEFENDANT

No. COA17-1355

Filed 18 September 2018

1. Rape—first-degree—sufficiency of evidence

The State presented sufficient evidence to withstand defendant's motion to dismiss the charge of first-degree rape where multiple eyewitnesses identified defendant as the man straddling the victim in an alley and there was debris and a small black hair inside the victim's vaginal canal.

2. Satellite-Based Monitoring—constitutionality of search—hearing required

The trial court erred by ordering defendant to enroll in satellite-based monitoring (SBM) upon his release from imprisonment without first conducting a hearing to determine the constitutionality of subjecting defendant to SBM, requiring the order to be vacated and the case to be remanded for a hearing on the matter.

Appeal by defendant from judgment and order entered 6 June 2017 by Judge Imelda J. Pate in New Hanover County Superior Court. Heard in the Court of Appeals 6 June 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamara S. Zmuda, for the state-appellee.

Mark Montgomery for defendant-appellant.

ZACHARY, Judge.

Defendant Damien Aaron White appeals (1) from the trial court's order denying his Motion to Dismiss his charge of first-degree rape, and (2) from the trial court's order enrolling him in satellite-based monitoring. Because we conclude that the State presented sufficient evidence to withstand Defendant's Motion to Dismiss his first-degree rape charge, we affirm the trial court's denial of the Motion to Dismiss. Because the trial court did not conduct a hearing to determine whether it would be constitutional to subject Defendant to satellite-based monitoring upon

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his release, we vacate the trial court's order enrolling Defendant in satellite-based monitoring, and remand for a hearing on this matter.

Background

Defendant was indicted for first-degree rape and was tried before a jury beginning on 30 May 2017. The victim could not remember the incident, and thus was unable to testify that she had been raped or that Defendant was the one who had raped her. Rather, the evidence at Defendant's trial tended to show the following:

The victim was out with several of her friends one night in downtown Wilmington. The victim and Defendant had never met each other prior to this time. At approximately 1:30 a.m., the victim and her friend Eddie were talking when a man—whom Eddie was “six out of ten” sure was Defendant—approached the victim. The victim and the man walked away together. Ten minutes later, the victim's friend Katherine ran into the victim. The victim eventually walked away from Katherine, at which point a man—whom Katherine was “95 percent confident” was Defendant—asked Katherine if the victim was okay.

Later in the evening, Jean and John, strangers to the victim, were walking downtown when they heard a woman screaming for help. Jean and John ran toward the screams and came upon a man in an alley “straddling” the victim, “in like a missionary position.” John threw the man off of the victim, and recalled that he could “clearly see [the man] pulling his pants up” and that the man had an erection. The man said, “It's not what it looks like,” and another individual yelled out, “He raped her, call the police.” The man then took off running. John and another male ran after the man while Jean stayed with the victim, who had been left on the ground with her pants and underwear pulled down to her ankles.

Officer Benjamin Galluppi was on duty near the scene when he saw Defendant being chased by two males. Officer Galluppi was able to detain Defendant, whose pants were undone. Jean and John participated in a show-up identification of Defendant shortly thereafter. Jean was “a hundred percent sure,” and John had no “doubt in [his] mind,” that Defendant was the man that they had just seen straddling the victim in the alley.

The victim was taken to the emergency room where she was examined by Wendy Bledsoe, an emergency room nurse and expert in sexual assault examination. In addition to having sustained a concussion and various injuries to her head, neck, and forearm, Nurse Bledsoe testified that she found “debris and a small black hair inside the vagina on one

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of the [victim's] vaginal walls" that was "most consistent with a pubic hair." The victim did not have pubic hair. The victim's sexual assault kit was tested, but no sperm or semen was found. A DNA sample was taken from the victim's underwear and revealed one profile matching the victim's DNA and another "minor profile." However, the profile not belonging to the victim "was inconclusive due to insufficient quality and quantity of DNA present" on the underwear.

Defendant also testified at trial as follows: Defendant went downtown that evening to go out with friends but could not get into any bars because he did not have his identification. Accordingly, he spent most of the evening talking to his friends outside in the street and walking around trying to find a bar into which he could gain admission without identification.

At one point Defendant walked to a parking garage in order to urinate. Afterward, Defendant recalls seeing the victim:

[T]here was a young woman [the victim] who was walking down the street. You could definitely tell she had been drinking and everything. She was stumbling as she was walking. She could walk but she was stumbling and everything, and she had walked up and interlocked her arm with mine, and I smiled at her and she smiled at me and we kept walking down the street.

And I'm walking back . . . and I think we got maybe like maybe a block and a half . . . and she had seen two other male gentlemen that I assumed she knew and she separated from me and went to them and interlocked between them two and I looked at them. I asked did they have her, was everything fine, they said yeah, they had her and they went off across the street in the opposite direction and I went further down. I said okay and kept going. That was it. I continued walking.

Defendant came across the victim once again later in the evening:

. . . I was walking up the street and then there is an alleyway that was to my right and on the side of the street that I was walking on, there was hardly anybody or anything on it, so I wanted to get to the other side where it was more populated and where I could see more people and try to find some area because at that point I didn't know where I was at.

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And so as soon as I turned down the alleyway, right at the very beginning of the alleyway, there was a dumpster and right there was a young woman out like exposed, laying on her side. . . . [A]nd so I knelt down in front of her to ask her if she was all right or if she needed anything or any kind of help and as soon as I got her attention, she turns and looks at me and at that point I could tell that this is the same young woman who I had seen earlier.

She starts to scream, “Get away from me nigger, get away from me, nigger,” over and over again. So I’m like moderate reaction, just like, whoa, and I stand up and . . . as soon as I stand up, it’s almost immediately I see fists and people are trying to attack me and I didn’t know what was going on in that situation.

The first thought is, I mean, I’m in unfamiliar territory, I don’t know what’s going on and I’m being attacked. And so my initial thought was to leave, get away from the situation, so that’s what I did, I ran.

Defendant testified that Officer Galluppi possibly saw that his pants were unzipped because he had just gone to the bathroom, and that “I do have a habit of maybe leaving a fly undone, so it is quite possible that I didn’t zip my pants back up afterwards.” Defendant testified that he never pulled his pants off or down that evening, but that he does like to wear his pants “loose,” and that if he “ever ha[s] to bend over or to pick something up, sit down for too long or kneel down for anything, once I stand up I have to readjust my pants.”

Finally, Defendant testified that he did not rape the victim, did not attempt to rape the victim, did not pull her pants down, and did not “ever touch her in any manner other than attempt to assist her.”

Defendant’s trial counsel moved to dismiss the first-degree rape charge for insufficient evidence. The trial court denied Defendant’s Motion to Dismiss and the jury subsequently convicted Defendant of first-degree rape. The trial court sentenced Defendant to 240 to 300 months’ imprisonment and ordered that he enroll in satellite-based monitoring for the remainder of his natural life upon his release from prison. The trial court ordered Defendant to enroll in satellite-based monitoring without first having conducted an inquiry into whether doing so would constitute a permissible Fourth Amendment search.

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Defendant appealed from his conviction in open court and filed written notice of appeal from the trial court's order enrolling him in satellite-based monitoring. On appeal, Defendant argues (1) that the trial court erred in denying Defendant's motion to dismiss his first-degree rape charge for insufficiency of the evidence, and (2) that the trial court erred in ordering lifetime satellite-based monitoring without first conducting a hearing on its constitutionality.

Motion to Dismiss

[1] The standard of review on a motion to dismiss is well established:

When reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines whether the State presented substantial evidence in support of each element of the charged offense. Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. The defendant's evidence, unless favorable to the State, is not to be taken into consideration, except when it is consistent with the State's evidence, the defendant's evidence may be used to explain or clarify that offered by the State. Additionally, a substantial evidence inquiry examines the sufficiency of the evidence presented but not its weight, which is a matter for the jury. Thus, if there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.

State v. Hunt, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012) (citations and emphasis omitted).

"The test of the sufficiency of the evidence on a motion to dismiss is the same whether the evidence is direct, circumstantial, or both." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984) (citation omitted). Where the State's evidence of the defendant's guilt is circumstantial, "the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually

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guilty.” *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965) (citation omitted).

In order to survive a motion to dismiss a charge of first-degree rape, the State must present sufficient evidence that the defendant “engage[ed] in vaginal intercourse with another person by force and against the will of the other person[.]” N.C. Gen. Stat. § 14-27.21(a) (2017). “The slightest penetration of the female sex organ by the male sex organ is sufficient to constitute vaginal intercourse within the meaning of the statute.” *State v. McNicholas*, 322 N.C. 548, 556, 369 S.E.2d 569, 574 (1988) (citing *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985)).

In the instant case, Defendant argues that the trial court erred when it denied his Motion to Dismiss because the State failed to present sufficient evidence (1) that the perpetrator engaged in vaginal intercourse with—*i.e.*, “penetrated”—the victim, and (2) if so, that Defendant was the perpetrator. We disagree.

The evidence to which the State points in support of the trial court’s denial of Defendant’s Motion to Dismiss tended to show that the victim was heard screaming “Help, help me.” The scream was “absolutely not” a joke: “It was a distress, it was—it was scary. It was you knew something was seriously wrong.” When Jean and John ran toward the sound of the victim’s screams, they “saw a man straddling” the victim “in like a missionary position,” at which point John “ran up to him and I threw him off of her and he stands up.” John testified that when he pushed the man off of the victim, “I’m watching his hands and I can clearly see him pulling his pants up[.]” The man looked “like a deer caught in headlights . . . like in shock, like standing there[.]” and “had an erection.” The victim’s “underwear and her pants were all the way to the ankle.” Jean testified that someone yelled, “Call the police, he raped her,” at which point the man “took right off. As soon as that was said, he was gone.” Jean testified that the victim was crying and “kept thanking me,” and that, “I’m a mom, I just—I knew she went through something, I just held her.”

In addition, Nurse Bledsoe found “debris and a small black hair inside the vagina on one of the [victim’s] vaginal walls” that was “most consistent with a pubic hair.” The victim did not have pubic hair. The following exchange took place between Nurse Bledsoe and the State regarding the debris and hair found inside the victim:

Q. In your training and experience, Ms. Bledsoe, if a female sits on a beach without bathing suit bottoms, for example, would the sand go up inside her vaginal canal?

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...

A. No.

Q. In your training and experience, if a female goes swimming and, say, is not wearing bathing suit bottoms, if there is debris in the water, would that go up inside that female?

...

A. No.

Q. And if a female sits on a paved alley that has dirt and debris all over it, just by sitting there would that dirt and debris be pulled up by the vaginal canal?

...

A. No.

Q. And why is that?

...

A. The typical state of the vaginal walls, as I mentioned earlier, are collapsed in their normal state, they're collapsed and they only open up if something is introduced inside of them.

The victim's friend Eddie identified Defendant as the man that he saw with the victim roughly thirty minutes before the assault took place to a sixty-percent degree of certainty. Ten minutes after Defendant was identified as being with the victim, the victim's friend Katherine testified that a man came up to her and asked if the victim was okay. Katherine identified Defendant as the person she spoke to that night with "95 percent confiden[ce]." Officer Galluppi observed Defendant running away from the scene of the assault and being chased by John and the other male. Officer Galluppi apprehended Defendant. At show-up identifications of Defendant shortly thereafter, Jean was "a hundred percent sure" that Defendant was the man who she saw straddling the victim, and John had no "doubt in [his] mind" that Defendant was the man whom he had thrown off of the victim.

"Considered in the light most favorable to the State, a reasonable juror could have inferred from this evidence" (1) that the victim was vaginally penetrated against her will, and (2) that Defendant was the perpetrator of that assault. *Hunt*, 365 N.C. at 440, 722 S.E.2d at 490 (citation omitted). Defendant's arguments pertaining to the discrepancies and

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inconsistencies in the evidence go to the evidence's weight rather than its sufficiency and were thus matters to be resolved not by the trial judge, but by the jury. *Hunt*, 365 N.C. at 436, 722 S.E.2d at 488. Accordingly, the trial court properly denied Defendant's Motion to Dismiss the first-degree rape charge.

Satellite-Based Monitoring

[2] Our General Assembly has enacted "a sex offender monitoring program that uses a continuous satellite-based monitoring system . . . designed to monitor" the location of individuals convicted of certain sex offenses after they are released from prison. N.C. Gen. Stat. § 14-208.40(a) (2017).

The United States Supreme Court has held that [this] program constitutes a search for purposes of the Fourth Amendment. *Grady v. North Carolina*, 575 U.S. ___, ___, 191 L. Ed. 2d 459, 462, 135 S. Ct. 1368 (2015) [("*Grady I*")]. As such, North Carolina courts must first "examine whether the State's monitoring program is reasonable—when properly viewed as a search"—before subjecting a defendant to its enrollment. *Id.* at ___, 191 L. Ed. 2d at 463. This reasonableness inquiry requires the court to analyze the "totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* at ___, 191 L. Ed. 2d at 462.

State v. Greene, ___ N.C. App. ___, ___, 806 S.E.2d 343, 344 (2017). The State bears the burden of proving that enrollment in satellite-based monitoring is a permissible Fourth Amendment search of each particular defendant targeted. *State v. Blue*, ___ N.C. App. ___, ___, 783 S.E.2d 524, 527 (2016); *State v. Morris*, ___ N.C. App. ___, ___, 783 S.E.2d 528, 530 (2016). This Court recently addressed the framework governing the constitutionality of satellite-based monitoring orders in *State v. Gordon*, No. COA17-1077, ___ N.C. App. ___, ___ S.E.2d ___ (filed Sept. 4, 2018), *State v. Griffin*, No. COA17-386, ___ N.C. App. ___, ___ S.E.2d ___ (filed Aug. 7, 2018), and on remand from *Grady I* in *State v. Grady*, ___ N.C. App. ___, 817 S.E.2d 18 (2018) ("*Grady II*").

In the instant case, after judgment was entered, the trial court ordered Defendant to enroll in satellite-based monitoring for the remainder of his natural life. The trial court did so despite not having held a hearing or having made a determination on the constitutionality of that search. The trial court simply concluded that, "in regard to

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satellite-based monitoring, that upon release from imprisonment, the defendant shall enroll in satellite-based monitoring for the rest of his natural life.” The State had not yet offered any evidence in support of the constitutionality of the satellite-based monitoring of Defendant after Defendant’s eventual release from prison. Defendant cited *Grady I* and objected to the constitutionality of the satellite-based monitoring program, which the trial court stated was “so noted and those objections are denied.” Defendant filed proper written notice of appeal.

It is clear that the trial court erred when it ordered Defendant to enroll in satellite-based monitoring upon his release from prison without first holding a hearing in order to determine whether doing so would be in compliance with the Fourth Amendment. *Blue*, ___ N.C. App. at ___, 783 S.E.2d at 527; *Morris*, ___ N.C. App. at ___, 783 S.E.2d at 529-530. In light of this deficiency on the part of the trial court, the State concedes that this Court should vacate the satellite-based monitoring order and “remand this issue to the trial court to provide the parties an opportunity to offer evidence and arguments regarding [satellite-based monitoring] and for the trial court to make findings as” to its constitutionality. Defendant, however, cites *Greene*, *supra*, and argues that the appropriate remedy is for this Court to reverse the satellite-based monitoring order without remanding for a hearing. Defendant’s application of *Greene* is misplaced.

In *Greene*, there was a hearing in the trial court. *Greene*, ___ N.C. App. at ___, 806 S.E.2d at 344. The State put forth scant evidence in support of the constitutionality of satellite-based monitoring and both parties presented arguments on the matter. *Id.* The defendant filed a motion to dismiss the State’s application for satellite-based monitoring, but the trial court concluded that the State’s evidence had established that satellite-based monitoring constituted a reasonable Fourth Amendment search of the defendant. *Id.* The defendant appealed, arguing that “the State’s evidence was insufficient to establish” the trial court’s finding “that the enrollment constituted a reasonable Fourth Amendment search[.]” *Id.* The State conceded that *the evidence it presented at the hearing* was insufficient. *Id.* We thus concluded that the matter “ended there[.]” and that the State was therefore not “permitted to ‘try again’ ” by presenting additional evidence at a second hearing. *Id.* at ___, 806 S.E.2d at 345. The defendant’s motion to dismiss should have been granted. *Id.*

In the instant case, there was no hearing. The trial court did not afford the State an opportunity to present evidence in order to establish the constitutionality of enrolling Defendant in satellite-based monitoring. Because no evidentiary hearing was held on the matter whatsoever,

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we are unable to review the propriety of enrolling Defendant in lifetime satellite-based monitoring. *Cf. Gordon*, No. COA17-1077, ___ N.C. App. ___, ___ S.E.2d ___ (filed Sept. 4, 2018). Accordingly, we must remand the matter to the trial court in order to conduct a hearing, at which time the State will be required to establish the constitutionality of subjecting Defendant to continuous location monitoring for the remainder of his natural life upon Defendant’s eventual release from prison. After allowing the State an opportunity to satisfy this arduous burden and after hearing arguments from both sides, the trial court must make its Fourth Amendment determination after having explicitly analyzed the “totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations[,]” in light of this Court’s recent opinions in *Gordon*, *Griffin*, and *Grady II*, *supra*. *Grady*, 575 U.S. at ___, 191 L. Ed. 2d at 462. The remand hearing will be the State’s sole opportunity to present evidence that ordering Defendant to enroll in satellite-based monitoring for the remainder of his natural life after Defendant has been released from prison will constitute a permissible search under the Fourth Amendment. *Greene*, ___ N.C. App. at ___, 806 S.E.2d at 345.

Conclusion

The trial court’s order denying Defendant’s Motion to Dismiss is affirmed. The trial court’s order enrolling Defendant in satellite-based monitoring is vacated and remanded for the purpose of conducting an evidentiary hearing consistent with this Opinion.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judges ELMORE and HUNTER, JR. concur.

STATE v. WILLIAMS

[261 N.C. App. 516 (2018)]

STATE OF NORTH CAROLINA

v.

MONTREZ BENJAMIN WILLIAMS, DEFENDANT

No. COA16-178

Filed 18 September 2018

Constitutional Law—first-degree murder—juvenile offender—life without parole

In a case of first impression, the Court of Appeals determined that the Eighth Amendment required a trial court to consider, as a threshold matter, whether a juvenile offender convicted of first-degree murder qualified as an irreparably corrupt individual before imposing a sentence of life imprisonment without the possibility of parole. Where a trial court found that a juvenile offender's likelihood of rehabilitation was unknown or speculative, the imposition of life without parole was constitutionally invalid as applied to that individual.

Appeal by Defendant from Judgment entered 11 September 2015 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 August 2016. Supplemental briefing ordered on 21 May 2018.

Attorney General Joshua H. Stein, by Special Attorney General Lars F. Nance and Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for Defendant-Appellant.

INMAN, Judge.

More than a decade ago, the United States Supreme Court outlawed capital punishment for even the worst offenders under the age of eighteen. Six years ago, the United States Supreme Court held that the Eighth Amendment to the United States Constitution also prohibits mandatory life sentences without parole for juvenile offenders. Which leads to the next question: When does the Eighth Amendment allow for the sentencing of a juvenile offender to prison for life without the possibility of parole? Despite extensive critiques, courts in all jurisdictions are still discerning the appropriate criteria and methodology for

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imposing the harshest of sentences on young people whose entire lives lie before them and whose potential for change is generally unknowable.

This appeal presents the conflict arising when a trial court expressly finds that a juvenile offender's likelihood of rehabilitation is uncertain and sentences him to life in prison without parole. We hold that the United States Supreme Court's mandate that life without parole is reserved for those juvenile defendants who exhibit such irretrievable depravity that rehabilitation is impossible compels us to vacate the sentence in this case and remand for Defendant to be re-sentenced to life with the possibility of parole.

I. Facts and Procedural History

In 2008, Defendant was indicted on two counts of first-degree murder in the shooting deaths of Terry Rashad Long and Joshua Vinsel Davis. At the time of the shooting, Defendant was seventeen years old. In 2011, following a trial in Mecklenburg County Superior Court, a jury convicted Defendant on both charges based on a theory of malice, premeditation, and deliberation. Defendant was sentenced to two consecutive terms of life in prison without the possibility of parole. This Court upheld Defendant's conviction and sentence on appeal, *State v. Williams*, 220 N.C. App. 130, 724 S.E.2d 654 (2012), and the North Carolina Supreme Court dismissed his petitions for review. *State v. Williams*, 366 N.C. 240, 731 S.E.2d 167 (2012).

In June 2012, the United States Supreme Court decided *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), holding that mandatory sentences of life without parole for juvenile offenders violate the Eighth Amendment's prohibition against cruel and unusual punishments. Weeks later, in July 2012, the North Carolina General Assembly enacted an amendment to the sentencing statute, N.C. Gen. Stat. § 15A-1340.19B, removing the mandatory life sentence without parole for juvenile murderers and replacing it with a permissive sentencing scheme. 2012 N.C. Sess. Law 2012-148, § 1. The amended statute delineates mitigating factors to be considered in sentencing: (1) the offender's age at the time of offense; (2) immaturity; (3) ability to appreciate the risks and consequences of the conduct; (4) intellectual capacity; (5) prior record; (6) mental health; (7) familial or peer pressure exerted upon him; (8) likelihood that he would benefit from rehabilitation in confinement; and (9) other mitigating factors and circumstances. N.C. Gen. Stat. § 15A-1340.19B (2017).

Following the *Miller* decision, Defendant filed a motion for appropriate relief seeking a new sentencing hearing. Defendant's motion was

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granted. At the resentencing hearing, Defendant presented evidence related to several mitigating factors. After consideration of the evidence and arguments by counsel, the trial court entered a lengthy order containing 52 findings of fact and 16 conclusions of law; among them, the following conclusion: “There is no certain prognosis of Defendant[']s possibility of rehabilitation. The speculation of Defendant’s ability to be rehabilitated can only be given minimal weight as a mitigating factor.” The trial court sentenced Defendant to serve two consecutive sentences of life without parole, and Defendant appealed.

II. Analysis

In his original brief to this Court, Defendant argued that his sentence should be vacated because: (1) the trial court’s finding that Defendant’s potential for rehabilitation was speculative removes him from the permissible class of juveniles whom the United States Supreme Court has held are eligible for life without parole; (2) the trial court failed to give the required weight to the mitigating factors of youth, immaturity, diminished appreciation of risk, and negative peer and family pressure; (3) the trial court relied on unsupported findings regarding escalation of prior offenses and that the offense of which Defendant was convicted was a “Planned Ambush;” and (4) that N.C. Gen. Stat. § 15A-1340.19B is unconstitutional on its face. Because we are bound by the North Carolina Supreme Court’s recent decision in *State v. James*, __ N.C. __, 813 S.E.2d 195 (2018), which upheld the constitutionality of N.C. Gen. Stat. § 15A-1340.19B, we reject Defendant’s fourth argument and will not address it further. Because we agree with Defendant’s first argument that the trial court’s finding rendered him ineligible for sentences of life without parole, we need not address his remaining arguments.

A. Standard of Review

This Court reviews constitutional issues *de novo*. *State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 675 (2000). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citations omitted).

B. Discussion

After prohibiting mandatory sentences of life without parole for juvenile offenders in *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), the United States Supreme Court held in *Montgomery v. Louisiana* that “a lifetime in prison is a disproportionate sentence

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for all but the rarest of children, those whose crimes reflect irreparable corruption” and “who exhibit such irretrievable depravity that *rehabilitation is impossible*.” __ U.S. __, __, __, 193 L. Ed. 2d 599, 611, 619 (2016) (internal quotation marks and citations omitted) (emphasis added).

In this case we face a question of first impression: whether the Supreme Court’s holdings require trial courts to determine, as a threshold matter, whether a juvenile defendant is eligible for such punishment independent of other relevant factors, or whether it merely identifies additional factors that the trial court must consider as it weighs the totality of circumstances in making its sentencing decision. The answer lies in further study of *Miller* and its progeny.

In *Miller*, the United States Supreme Court held that mandatory sentences of life in prison without parole for juveniles—anyone under the age of eighteen—violate the Eighth Amendment to the United States Constitution’s prohibition against cruel and unusual punishments. 567 U.S. at 465, 183 L. Ed. 2d at 415. The Court reasoned that “juveniles have diminished culpability and greater prospects for reform . . . [thereby making them] less deserving of the most severe punishments.” *Id.* at 471, 183 L. Ed. 2d at 418 (internal quotation marks and citation omitted). The Court provided no specific criteria for sentencing a juvenile to life in prison without parole but predicted that “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” *Id.* at 479, 183 L. Ed. 2d at 424.

Following *Miller*, courts disputed whether its holding proscribed a procedural rule of constitutional law, which would apply only to prospective cases, or a substantive rule that applied retroactively. In *Montgomery*, the Supreme Court held that *Miller* “announced a substantive rule of constitutional law.” __ U.S. at __, 193 L. Ed. 2d at 620. However, the Court cautioned that States would be required to develop procedural criteria to protect juveniles’ substantive rights: “[t]hat *Miller* does not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment.” *Id.* at __, 193 L. Ed. 2d at 621. The Court’s justification for not imposing a formal factfinding requirement is derived from the notion that, “[w]hen a new substantive rule of constitutional law is established, [the United States Supreme Court] is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States’ sovereign administration of their criminal justice systems.” *Id.* at __, 193 L. Ed.

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2d at 621 (citation omitted). Despite this reservation, the *Montgomery* decision noted that “*Miller* did bar life without parole . . . for all but the rarest juvenile offenders, those whose crimes reflect permanent incorrigibility.” *Id.* at ___, 193 L. Ed. 2d at 620.

As Justice Sotomayor highlighted in a concurring opinion in *Tatum v. Arizona*, __ U.S. __, __, 196 L. Ed. 2d 284, 285 (2016) (Sotomayor, J., concurring), “the question *Miller* and *Montgomery* require a sentencer to ask [is]: whether the petitioner was among the very ‘rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.’ ” (citation omitted).

We interpret the United States Supreme Court’s decisions to prohibit imposing a sentence of life without the possibility of parole on any juvenile whom a trial court has found is constitutionally ineligible for that sentence, independent of its consideration of the totality of circumstances that might otherwise favor the harshest sentence. A closer look at North Carolina precedent supports this conclusion.

In *State v. James*, the North Carolina Supreme Court upheld the constitutionality of the newly amended N.C. Gen. Stat. § 15A-1340.19B. *James*, __ N.C. at __, 813 S.E.2d at 207. The Court relied on principles of statutory construction that direct our courts, when faced between two interpretations of a statute, to construe the statute as constitutional. *See id.* at __, 813 S.E.2d at 203 (“Where a statute is susceptible of two interpretations, one of which is constitutional and the other not, the courts will adopt the former and reject the latter.” (internal quotation marks and citations omitted)). *James* considered whether N.C. Gen. Stat. § 15A-1340.19B creates a presumption of life without parole for juvenile offenders convicted of first-degree murder on a basis other than the felony murder rule,¹ *id.* at __, 813 S.E.2d at 200, the argument being that if such a presumption is present, N.C. Gen. Stat. § 15A-1340.19B conflicts with *Miller*. *Id.* at __, 813 S.E.2d at 207.

The North Carolina Supreme Court in *James* skeptically viewed the State’s argument that a statute including a presumption of life imprisonment without parole for juvenile offenders would pass constitutional muster:

In view of the fact “that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those

1. Section 15A-1340.19B mandates that juveniles found guilty of first-degree murder on the sole basis of the felony murder rule are to be sentenced to life in prison with the possibility of parole. N.C. Gen. Stat. § 15A-1340.19B(a)(1) (2015).

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whose crimes reflect ‘irreparable corruption,’ ” a statutory sentencing scheme embodying a presumption in favor of a sentence of life imprisonment without the possibility of parole for a juvenile convicted of first-degree murder on the basis of a theory other than the felony murder rule would be, at an absolute minimum, in considerable tension with the General Assembly’s expressed intent to adopt a set of statutory provisions that complied with *Miller* and with the expressed intent of the United States Supreme Court that, as a constitutional matter, the imposition of a sentence of life imprisonment without the possibility of parole upon a juvenile be a rare event.

Id. at __, 813 S.E.2d at 206-07 (quoting *Montgomery*, __ U.S. at __, 193 L. Ed. 2d at 611). This analysis is consistent with that adopted by other state courts. *See, e.g., People v. Gutierrez*, 58 Cal.4th 1354, 1328, 1387, 171 Cal.Rptr.3d 421, 324 P.3d 245, 264, 267 (2014) (holding that interpreting a sentencing statute as establishing “a presumption in favor of life without parole [for juvenile homicide offenders] raises serious constitutional concerns under the reasoning of *Miller* and the body of precedent upon which *Miller* relied”).

The *James* court instead held that N.C. Gen. Stat. § 15A-1340.19B provides trial courts with an even choice between two equal alternative sentencing options—life with parole or life without parole. *James*, __ N.C. at __, 813 S.E.2d at 204. In so holding, *James* rejected the notion that a sentencing statute must presume a sentence of life with the possibility of parole for juvenile offenders. *See id.* at __, 813 S.E.2d at 207 (“[T]rial judges sentencing juveniles convicted of first-degree murder on the basis of a theory other than the felony murder rule should refrain from presuming the appropriateness of a sentence of life imprisonment without the possibility of parole and select between the available sentencing alternatives based solely upon a consideration of ‘the circumstances of the offense,’ ‘the particular circumstances of the defendant,’ and ‘any mitigating factors,’ as they currently do.” (internal citations omitted)). Because it held that N.C. Gen. Stat. § 15A-1340.19B does not create a presumption in favor of life without parole, the North Carolina Supreme Court did not reach the issue of whether such a presumption would be constitutional under *Miller* and its progeny.

James also contemplated whether *Miller* requires a trial court to make an explicit finding that the juvenile is “ ‘irreparably corrupt’ or ‘permanently incorrigible’ before the juvenile can be sentenced to life imprisonment without the possibility of parole.” *James*, __ N.C. at __,

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813 S.E.2d at 208. To this end, the North Carolina Supreme Court, interpreting N.C. Gen. Stat. § 15A-1340.19B *in pari materia* with the other parts of the Juvenile Code,² explained:

[A] trial judge required to sentence a juvenile convicted of first-degree murder on the basis of a theory other than the felony murder rule must consider “all the circumstances of the offense,” “the particular circumstances of the defendant,” and the mitigating circumstances enumerated in subsection 15A-1340.19B(c), [N.C. Gen. Stat.] § 15A-1340.19C, and comply with *Miller*’s directive that sentences of life imprisonment without the possibility of parole for juveniles convicted of first-degree murder should be the exception, rather than the rule, with the “harshest prison sentence” to be reserved for “the rare juvenile offender whose crime reflects irreparable corruption,” rather than “unfortunate yet transient immaturity.” *Miller*, 567 U.S. at 479-80, 183 L. Ed. 2d at 424. In our view, the statutory provisions at issue in this case, when considered in their entirety and construed in light of the constitutional requirements set out in *Miller* and its progeny as set out in more detail above, provide sufficient guidance to allow a sentencing judge to make a proper, non-arbitrary determination of the sentence that should be imposed upon a juvenile convicted of first-degree murder on a basis other than the felony murder rule to satisfy due process requirements.

Id. at ___, 813 S.E.2d at 208. *James* further held that the newly amended sentencing statute was sufficient without additional procedural requirements, such as the consideration of aggravating factors:

As a result of the fact that the statutory provisions at issue in th[e] case require consideration of the factors enunciated in *Miller* and its progeny and the fact that *Miller* and its progeny indicate that life without parole sentences for juveniles should be exceedingly rare and reserved for specifically described individuals, we see no basis for concluding that the absence of any requirement that the sentencing authority find the existence of aggravating

2. Other Juvenile Code provisions the Supreme Court cited included N.C. Gen. Stat. §§ 15A-1340.19A through 15A-1340.19D, which set forth the scheme designed for sentencing juveniles convicted of first-degree murder. *James*, ___ N.C. at ___, 813 S.E.2d at 198.

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circumstances or make any other narrowing findings prior to determining whether to impose a sentence of life without parole upon a juvenile convicted of first-degree murder on a basis other than the felony murder rule renders the sentencing process enunciated in [N.C. Gen. Stat.] §§ 15A-1340.19A to 15A-1340.19D unconstitutionally arbitrary or vague.

Id. at ___, 813 S.E.2d at 209.

Following *Miller*, *James*, and their progeny, we hold that whether a defendant qualifies as an individual within the class of offenders who are irreparably corrupt is a threshold determination that is necessary before a life sentence without parole may be imposed by the trial court. This holding is not inconsistent with the North Carolina Supreme Court's rejection of a specific factfinding requirement. Rather, we hold that, when a trial court does make a finding about a juvenile offender's possibility of rehabilitation that is inconsistent with the limited class of offenders defined by the United States Supreme Court, a sentence of life in prison without the possibility of parole is unconstitutional as applied to that offender.

In *State v. Sims*, this Court upheld the imposition of a life sentence without parole for a juvenile offender who was not found to have any characteristic inconsistent with constitutional restrictions. __ N.C. App. __, __, __ S.E.2d __, __ (COA17-45) (2018 WL 3732800). The defendant in *Sims* challenged, among other things, the trial court's finding regarding his likelihood of benefiting from rehabilitation in confinement. *Id.* at __, __ S.E.2d at __. This Court concluded, "[w]hile *Miller* states that life without parole would be an uncommon punishment for juvenile offenders, *the trial court has apparently determined that [the] defendant is one of those 'rare juvenile offenders' for whom it is appropriate.*" *Id.* at __, __ S.E.2d at __ (emphasis added) (quoting *Miller*, 567 U.S. at 479, 183 L. Ed. 2d at 424). We explained that "[t]he trial court's unchallenged evidentiary findings combined with its ultimate findings regarding the *Miller* factors demonstrate that the trial court's determination was the result of a reasoned decision." *Id.* at __, __ S.E.2d at __. In essence, the trial court in *Sims* impliedly found that the defendant fell within the class of irreparably corrupt offenders, and did not find any characteristic in the defendant inconsistent with that class of offenders.

Turning to the case at hand, we conclude that the trial court erred by imposing a sentence of life in prison without the possibility of parole

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after making a finding contrary to the defined class of irreparably corrupt offenders described in our precedent. Unlike in *Sims*, the trial court here made an explicit finding that “there is no certain prognosis” for Defendant’s potential for rehabilitation. This finding directly conflicts with the limitation of life in prison without parole to juvenile offenders who are “irreparably corrupt” and “permanently incorrigible.” As Judge Stroud, concurring in *Sims*, explained: “‘Permanent’ means forever. ‘Irreparable’ means beyond improvement. In other words, the trial court should be satisfied that in 25 years, in 35 years, in 55 years—when the defendant may be in his seventies or eighties—he will likely still remain incorrigible or corrupt, just as he was as a teenager, so that even then parole is not appropriate.” *Sims*, __ N.C. App. at __, __ S.E.2d at __ (Stroud, J., concurring). Because the trial court made an explicit finding contrary to a determination that Defendant is one of those rarest of juvenile offenders for whom rehabilitation is impossible and a worthless endeavor, we hold the trial court erred by imposing a life sentence without the possibility of parole.

III. Conclusion

For the foregoing reasons, we vacate the trial court’s judgment and remand for Defendant to be resentenced to two consecutive terms of life imprisonment with the possibility of parole.

VACATED AND REMANDED.

Chief Judge McGEE and Judge STROUD concur.

TOWN OF CARRBORO v. SLACK

[261 N.C. App. 525 (2018)]

THE TOWN OF CARRBORO, NORTH CAROLINA; THE TOWN
OF CHAPEL HILL, NORTH CAROLINA; ORANGE COUNTY, NORTH CAROLINA;
AND WILLIAM INMAN, PLAINTIFFS

v.

ANDREW SLACK AND BETHANY SLACK, DEFENDANTS

No. COA17-864

Filed 18 September 2018

1. Easements—prior transaction—third parties—intent to create express easement appurtenant—valid only between owners

In an action to establish access to a gravel road separating adjacent properties, a prior transaction by a landowner granting an easement to non-landowner third parties merely created an easement in gross as to those third parties, and not an easement appurtenant running with the land. To create an easement appurtenant, the easement must be granted by the owner of the servient estate and accepted by the owner of the dominant (benefiting) estate.

2. Easements—express easement by reservation—necessary language in deed

In an action to establish access to a gravel road separating adjacent properties, plaintiffs failed to show that an express easement by reservation was created where none of the deeds in the defendants' chain of title contained any reservation or exception. Although all the deeds in defendant landowners' chain of title referenced a "private road" on the eastern edge of their property, none had language indicating an intent to withhold a portion of the conveyance so as to create an easement by reservation.

3. Easements—implied easement by dedication—public use—sufficiency of evidence

In an action to establish access to a gravel road separating adjacent properties, plaintiffs failed to show possession of an implied easement by dedication by which deeds referencing a "private road" could be construed to create an easement for public use where the recorded instruments themselves did not indicate an intent to create such an easement, no public authority expressly or implicitly accepted a dedication, and the actions of the landowners were not consistent with an intent to create one.

4. Easements—implied easement by plat—conveyance necessary

In an action to establish access to a gravel road separating adjacent properties, plaintiffs failed to show an implied easement

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by plat because defendants never conveyed any property to them, undermining the argument that defendants should be estopped from denying the existence of an easement plaintiffs relied on when purchasing their property.

5. Easements—implied easement by estoppel—equity arguments—inducement and reliance required

In an action to establish access to a gravel road separating adjacent properties, government plaintiffs failed to show they possessed an implied easement by estoppel because they could not show they were innocently and ignorantly induced by defendants to believe they possessed an easement before making plans for development of their land. Further, government plaintiffs' own actions in approving defendants' request to build a bioretention basin in the path of the purported easement undermined its argument for equitable consideration.

6. Easements—by prescription—rebuttable presumption of permissive use—regular use and upkeep

In an action to establish access to a gravel road separating adjacent properties, a private citizen neighbor established a prescriptive easement claim by rebutting the presumption that his use of a private road across defendants' property was permissive by showing that he maintained a private right of way across the eastern edge of defendants' property through regular use to access his own property and regular physical maintenance of the road. However, the trial court erred by entering a permanent injunction enjoining defendants from taking any measures that would prevent trespassers from using the road.

Appeal by defendants from order entered 17 May 2017 by Judge A. Graham Shirley in Orange County Superior Court. Heard in the Court of Appeals 7 February 2018.

The Brough Law Firm, PLLC, by G. Nicholas Herman; Ralph D. Karpinos, Town Attorney for Town of Chapel Hill; and John Roberts, Orange County Attorney, for plaintiffs-appellees local governments.

Wyrick Robbins Yates & Ponton LLP, by Paul J. Puryear, Jr. and Tobias S. Hampson, for plaintiff-appellee William Inman.

Hendrick Bryant Nerhood Sanders & Otis, by Matthew H. Bryant and Benjamin C. McManus, for defendants-appellants.

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DIETZ, Judge.

Andrew and Bethany Slack own a home on several acres of land in Orange County. There is a gravel road along the eastern edge of their property. That private drive has existed in one form or another since at least the 1940s. This appeal concerns who, if anyone, has an easement to use that gravel road to access other properties north of the Slacks' property.

At the summary judgment hearing below, Plaintiffs asserted a slew of alternative legal theories touching on nearly every form of express and implied easement known to the law. We address each theory in turn below but ultimately conclude that the government plaintiffs—Carrboro, Chapel Hill, and Orange County—do not possess any easement rights over the Slacks' property. We therefore reverse and remand that portion of the trial court's summary judgment order for entry of judgment in favor of the Slacks. We affirm the trial court's entry of summary judgment in favor of Plaintiff William Inman on his prescriptive easement claim, but vacate and remand the trial court's permanent injunction for further proceedings in light of the reasoning set forth in this opinion.

Facts and Procedural History

This dispute involves four adjacent tracts of land which, for purposes of illustration, can be envisioned as four quadrants on a map. In the northwest quadrant (the upper left) is a roughly 100-acre tract owned by the Town of Carrboro, the Town of Chapel Hill, and Orange County. Proceeding clockwise from there, the northeast quadrant is William Inman's property, including his home. To the southeast lies the property of the Episcopal Church of the Advocate. To the southwest is the property of Andrew and Bethany Slack, including their home.

On the border between the Slack property and the Church property is a gravel road. The road extends from the southern border of the properties all the way to the Inman and government properties to the north.

This gravel road is the heart of the litigation. The road has existed at least since the 1940s and all of the deeds in the Slacks' chain of title reference this "private road" to describe the eastern border of the Slacks' property.

On 9 August 1965, the Slacks' predecessors-in-interest, the Cardens, executed a deed granting a "perpetual easement" that "is appurtenant to and runs with the land" to Grady & Dryer Development Company and James Watson. The easement granted a thirty-foot right of way on the eastern edge of the Slacks' property (along the border with the Church

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property) to permit ingress and egress to the “Byrd Farm,” which is now the properties owned by Inman and the government. The deed required Grady & Dryer Development Company and Watson to “pave a roadway along said right of way,” to “landscape said right of way,” and to “cause same to be passable for ingress and egress at all times during construction.”

At the time the parties executed this instrument, Grady & Dryer Development Company and James Watson apparently had plans to buy the Byrd Farm and to develop it. But that did not happen. These developers did not own the Byrd Farm property when the Cardens executed the deed and they never acquired title at any future point.

Roughly a month later, on 3 September 1965, the predecessor-in-interest to the Church property (the property to the east of the Slacks) granted an easement appurtenant to the owners of the Byrd Farm. Unlike the easement involving the Slacks’ property, which was between the Slacks’ predecessors-in-interest and third parties, this easement was between the owner of the Church property and the owner of the Byrd Farm to the north (now the Inman and government properties). The easement described a sixty-foot right of way in areas south of the Slacks’ property that then narrowed to a thirty-foot easement along the western border of the Church property adjacent to the Slacks’ property. If this easement were combined with the one concerning the Slacks’ property, together they would create a continuous, sixty-foot right of way leading to the Byrd Farm property to the north.

In 2015, the Slacks began re-grading the gravel road on the eastern border of their property and, in doing so, shifted that gravel road slightly westward, entirely onto their property. The Slacks also began constructing a fence separating their property from the Church property. At that point, the government plaintiffs and Inman objected, arguing that they possessed an easement over the Slacks’ property—one that was contiguous with the express easement appurtenant on the Church property—and that this easement prohibited the Slacks from moving the gravel road or constructing a fence on their property line.

This lawsuit followed, and the trial court ultimately entered summary judgment in favor of the Plaintiffs, concluding that they possessed an easement along the eastern border of the Slacks’ property. The trial court permanently enjoined the Slacks from moving or impeding the gravel road, or placing any fence along the eastern border of the Slacks’ property. The Slacks timely appealed.

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Analysis

We review the trial court's grant of summary judgment *de novo*. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). Summary judgment is proper where there is no genuine issue as to any material fact and a party is therefore entitled to judgment as a matter of law. *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 228, 768 S.E.2d 582, 597 (2015). Plaintiffs asserted a number of legal theories to support their motion for summary judgment and the trial court's order does not identify the particular theory or theories on which it relied. We therefore address each of Plaintiffs' theories in turn below.

I. Express Easement Appurtenant

[1] Plaintiffs first argue that they hold an express easement appurtenant over a thirty-foot right of way along the eastern border of the Slacks' property.

An easement appurtenant "runs with the land," and is a "right to use the land of another, i.e., the servient estate, granted to one who also holds title to the land benefitted by the easement, i.e., the dominant estate." *Brown v. Weaver-Rogers Assocs., Inc.*, 131 N.C. App. 120, 123, 505 S.E.2d 322, 324 (1998). The easement "is owned in connection with other real estate and as an incident to such ownership." *Shingleton v. State*, 260 N.C. 451, 454, 133 S.E.2d 183, 185 (1963). This distinguishes an easement appurtenant from an easement in gross, which is a personal license to the grantee and does not run with the land itself. *Brown*, 131 N.C. App. at 123, 505 S.E.2d at 324.

In 1965, the Slacks' predecessors-in-title, the Cardens, granted to Grady & Dryer Development Company and James Watson a thirty-foot easement along the edge of the Cardens' property. This easement allowed the grantees to access the Byrd Farm (the property now owned by Plaintiffs) from a nearby road bordering the Cardens' property. The easement granted "a perpetual right and easement, for ingress and egress . . . it being agreed that the right and easement hereby granted is *appurtenant to and runs with the land*." (Emphasis added.)

This language unquestionably indicates an *intent* to grant an easement appurtenant that runs with the Carden property (the servient estate) for the benefit of the Byrd Farm (the dominant estate). But there is a problem. The grantees, Grady & Dryer Development Company and James Watson, did not own the Byrd farm (the dominant estate) at the time the Cardens granted this purported easement appurtenant. Indeed,

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these grantees *never* owned the Byrd Farm—the record suggests that they planned to buy the property at some point, but the sale never took place.

Plaintiffs contend that “it makes no difference that Grady & Dryer Development Company and James A. Watson never acquired any interest in the [Byrd Farm] because the easement granted by Carden was not ‘in gross’ and purely personal to those grantees.” Thus, Plaintiffs reason, because the easement expressly states that it is not a personal license and that it runs with the land, it necessarily must be an easement appurtenant.

We reject this argument. An easement appurtenant must be “granted to one who also holds title to the land benefitted by the easement, i.e., the dominant estate.” *Brown*, 131 N.C. App. at 123, 505 S.E.2d at 324. “The easement attaches to the dominant estate and passes with the transfer of the dominant estate as ‘an appurtenance thereof.’” *Id.*

A landowner cannot create an easement appurtenant in a transaction with a complete stranger to the dominant estate. *See Woodring v. Swieter*, 180 N.C. App. 362, 368, 637 S.E.2d 269, 275–76 (2006). Although easements appurtenant generally are favorable to the owner of the dominant estate, they are “owned in connection with [the dominant estate] and as an incident to such ownership.” *Shingleton*, 260 N.C. at 454, 133 S.E.2d at 185. In other words, they create property rights in the dominant estate. These rights cannot be unilaterally imposed on an unwilling landowner; the owner of the dominant estate must accept the creation of this property right. Thus, to create an easement appurtenant, the transaction that creates these rights and obligations must be between the owner of the servient estate and the owner of the dominant estate. *Brown*, 131 N.C. App. at 123, 505 S.E.2d at 324.

Here, the transaction was between the owner of the servient estate and third parties that did not own the dominant estate. As a result, despite language indicating an intent to create an easement appurtenant, this transaction created only an easement in gross granting personal rights to those third parties.

II. Express Easement by Reservation

[2] Plaintiffs next argue that that they possess an express easement by reservation because “every deed in the Slacks’ chain of title creates an easement by reservation over the ‘private road’ running to the ‘Byrd land’ from which [Plaintiffs’] properties originate.”

An easement by reservation or exception arises when the “grantor reserves something arising out of the thing granted” or “withdraws

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from the effect of the grant some part of the thing itself.” *Central Bank & Trust Co. v. Wyatt*, 189 N.C. 107, 109, 126 S.E. 93, 94 (1925). Plaintiffs focus their argument on the lack of any description in these deeds of the dominant estate and how this Court can look to extrinsic evidence to identify the intended dominant estate that benefits from this private road. But this overlooks a more fundamental problem with this argument: none of the deeds in the Slacks’ chain of title contain any reservation or exception.

To be sure, each deed references a “private road” on the eastern border of the Slack property. But the deeds do so in describing the boundaries of the property conveyed, which is identified as a tract of real estate in Orange County, North Carolina:

[B]ounded by J.O. Franklin, the old Byrd Farm, now McGhee, and a private road, and being more particularly described as follows:

BEGINNING in the center of said private road near the stable, running thence with said road North 250 feet to a bend in the road; thence North 35 degrees East 100 feet to another bend in the road; thence North 48 degrees East 369 feet to the old Byrd line, now McGhee . . .

Although an easement by reservation or exception need not use the words “reserve” or “except” to be effective, it must at least indicate some intent to withhold a portion of the conveyance. *Borders v. Yarbrough*, 237 N.C. 540, 542, 75 S.E.2d 541, 543 (1953). These deeds do not do so. The only language concerning this private road is descriptive, explaining the eastern boundary of the property conveyed. Accordingly, the language on which Plaintiffs rely is insufficient to create an express easement by reservation or exception.

III. Implied Easement by Dedication

[3] Plaintiffs next contend that they possess an implied easement by dedication.¹ “Dedication is a form of transfer whereby an individual grants to the public rights of use in his or her lands.” *Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 631, 684 S.E.2d 709, 718 (2009). Dedication may be express or implied. *Id.*

1. The government plaintiffs appear to abandon this argument on appeal, but the trial court considered it, and the Slacks address it, so we will do so as well in our *de novo* review of the trial court’s order. *Builders Mut. Ins. Co.*, 361 N.C. at 88, 637 S.E.2d at 530.

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“[A]n implied dedication of property for public use requires (1) an offer of dedication, and (2) an acceptance of this offer by a proper public authority.” *Id.* at 639, 684 S.E.2d at 723. “When proving implied dedication, where no actual intent to dedicate is shown, the manifestation of implied intent to dedicate must clearly appear by acts which to a reasonable person would appear inconsistent and irreconcilable with any construction except dedication of the property to public use.” *Id.* at 640, 684 S.E.2d at 723. “Dedication is an exceptional and peculiar mode of passing title to an interest in land” and, thus, “courts will not lightly declare a dedication to public use.” *Id.* at 631, 684 S.E.2d at 718.

Plaintiffs argue that there is an implied easement by dedication based on references to a “private road” or other right of way in “the Slacks’ chain of title and those pertinent to other properties contiguous to” the Slacks’ property. But nothing in these recorded instruments indicates that the private parties involved intended to dedicate an easement for public use. Likewise, there is no indication that any public authority expressly or implicitly accepted a dedication. Thus, Plaintiffs have not shown that these recorded instruments are “inconsistent and irreconcilable with any construction except dedication of the property to public use.” *Id.* at 640, 684 S.E.2d at 723. Likewise, although the Slacks later dedicated a five-foot stormwater easement to the public in the path of this purported thirty-foot easement, nothing in that express dedication reflects an implied dedication of a thirty-foot easement for ingress and egress. Indeed, because that stormwater easement accompanied creation of a bioretention basin along the path of this thirty-foot easement, it arguably is inconsistent with dedication of a broader thirty-foot easement at that same location. We therefore reject Plaintiffs’ argument concerning an implied easement by dedication.

IV. Implied Easement by Plat

[4] Plaintiffs next contend that there is an implied easement by plat. “[W]here land is sold in reference to a plat or map, but the dedication of the land has not been formally accepted by the appropriate authority, purchasers of land who buy property relying on the plat still acquire an easement in those right-of-ways.” *Price v. Walker*, 95 N.C. App. 712, 715, 383 S.E.2d 686, 688 (1989). This is so because a “grantor who grants land described with reference to a plat showing a street is equitably estopped” from denying the existence of an easement over that street “to a purchaser.” *Webster’s Real Estate Law in North Carolina* § 15.15. Importantly, this type of easement arises only “when the purchaser whose transaction relies on the plat is conveyed the land.” *Price*, 95 N.C. App. at 715, 383 S.E.2d at 688.

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Applying this precedent here, Plaintiffs' argument fails. The Slacks and their predecessors-in-interest never granted anything to Plaintiffs. Creation of an implied easement by plat is grounded in principles of estoppel; the easement is created because a grantee purchases property in reliance on a right of way or other easement reflected in the plat at the time of the conveyance. *Id.*; *Webster's Real Estate Law in North Carolina* § 15.15. Because the Slacks never conveyed any property to Plaintiffs, the easement by plat theory is inapplicable. Accordingly, we reject this argument as well.

V. Implied Easement by Estoppel

[5] Plaintiffs next claim that they possess an implied easement through the equitable doctrine of estoppel. They argue that the Slacks are estopped from denying the existence of an easement on the eastern border of their property "because the Slacks' conduct in this case renders that assertion contrary to equity." Specifically, they contend that the Slacks acknowledged the easement in permit applications during the construction of the Slacks' home through notations indicating a right of way existed on the eastern portion of the property (although these permitting applications did not identify who, if anyone, was entitled to use that right of way). They also argue that the Slacks or their predecessors-in-title "remained silent at times they should have spoken," including when Inman repeatedly used the gravel road to access his own home, and when the government plaintiffs publicly discussed plans to build "affordable housing, open space, and possibly a school site" on their property and, in those public discussions, indicated that they would use the right of way across the Slacks' property to access these new developments.

Our Supreme Court has held that an easement may arise where one party induces another "innocently and ignorantly" to "expend money or labor in reliance on the existence of such an easement." *Delk v. Hill*, 89 N.C. App. 83, 87, 365 S.E.2d 218, 221 (1988). Inman's arguments on this issue are better characterized as claims for a prescriptive easement (on which, as explained below, he prevails) and we address them there. We reject the government plaintiffs' arguments because they have not presented any evidence that they innocently and ignorantly were induced to expend money or labor in reliance on an easement.

To be sure, the government plaintiffs have plans to develop their property. But even if the preliminary work on those future plans could be considered "money or labor" spent on the project, they have not shown—indeed, they do not even argue—that they did so *in reliance* on an easement across the Slacks' property. The only arguable reference to reliance

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in the government plaintiffs' brief is in relation to a public hearing in 2007. The government plaintiffs assert that access to their property from the south "was considered, during those 2007 discussions, critical for access to the tract and its future uses, notwithstanding that those uses are still indeterminate." But the government possesses the power of eminent domain. Thus, indicating that a roadway across a property owner's land will be necessary to a future public project does not in any way suggest that the government is relying on possession of an existing easement.

In any event, as with all estoppel arguments, the government plaintiffs' implied easement by estoppel argument is grounded in "principles of equity" that are "designed to aid the law in the administration of justice when without its intervention injustice would result." *Thompson v. Soles*, 299 N.C. 484, 486, 263 S.E.2d 599, 602 (1980). But the equities do not weigh in the government plaintiffs' favor nearly as strongly as they contend. For example, the government plaintiffs approved the Slacks' request to build a bioretention basin in the path of the purported easement that is inconsistent with the government's claim that it believed it possessed a right of way across that same stretch of land. And over time the government has been equivocal (at best) in its own assessment of whether it possesses an easement across the Slacks' property, at one point even suggesting in writing that "we have determined that the access easement is a 30-foot-wide [*sic*] and outside of the Slack's eastern property line." Simply put, even if the government plaintiffs could show that they were "innocently and ignorantly" induced into believing they possessed an easement on the Slacks' property (and they have not), they have not shown that the equities weigh sufficiently in their favor to compel creation of an implied easement where one does not exist in law. Accordingly, we reject the government plaintiffs' implied easement by estoppel arguments.

The government plaintiffs also cite cases (not in the implied easement context) involving the doctrine of quasi-estoppel, which provides that when "one having the right to accept or reject a transaction or instrument takes and retains benefits thereunder, he ratifies it, and cannot avoid its obligation or effect by taking a position inconsistent with it." *Redev. Comm'n of City of Greenville v. Hannaford*, 29 N.C. App. 1, 4, 222 S.E.2d 752, 754 (1976). But the government has not identified any transaction or instrument that the Slacks chose to accept that indicated the government plaintiffs possessed an easement across their land. The only remotely relevant evidence concerns the permit applications described above, which marked a right of way where the gravel road exists across their property. But as we noted in discussing those permit

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applications above, they do not indicate that the *government plaintiffs* had a right to use that right-of-way. Accordingly, quasi-estoppel is inapplicable here.

Because we reject all of the legal theories on which the government plaintiffs assert easement rights in the Slacks' property, we reverse the trial court's entry of summary judgment in favor of the government plaintiffs and remand for entry of summary judgment in favor of the Slacks on those claims.

VI. Easement by Prescription

[6] We thus turn to the final theory in this case—easement by prescription—which only Inman asserts on appeal. To prevail on a prescriptive easement claim, the claimant must establish: “(1) that the use is adverse, hostile, or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period.” *Myers v. Clodfelter*, __ N.C. App. __, __, 786 S.E.2d 777, 779–80 (2016).

There is a rebuttable presumption that use of a private road across another landowner's property is permissive, but our courts have long held that this presumption can be rebutted where the claimant shows that she maintained the private roadway, for example by grading or graveling it, or repeatedly clearing the path to permit travel. *Id.* at __, 786 S.E.2d at 781. These acts indicate a claim of right to use the roadway and thus “manifest and give notice that the use is being made under a claim of right.” *Id.* at __, 786 S.E.2d at 780.

Here, there is uncontested evidence in the record that Inman maintained a private right of way across the eastern portion of the Slacks' property by using a gravel road located there to access his property and by maintaining the gravel road through landscaping, mowing, and laying gravel. The record indicates that Inman's use and maintenance of this gravel road was under claim of right, open and notorious, and continuous and uninterrupted for a period of at least twenty years. Accordingly, the trial court properly entered summary judgment in favor of Inman on his prescriptive easement claim.

But it does not follow from this conclusion that the remainder of the trial court's order with respect to Inman is appropriate. Inman is entitled to use and maintain a right-of-way across the Slacks' property to access his own property. But the trial court's order goes further and permanently

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enjoins the Slacks from “erecting or placing any fencing or impediment within the thirty (30) most eastern feet of their property” or from “erecting or placing any fencing or impediment on their property that in any way obstructs [Inman’s] use of the gravel road in its existing location.”

The record indicates that the Slacks, too, use and maintain this gravel road on their property. And they wish to prevent trespassers—those other than Inman—from using that road. The Slacks are entitled to erect a gate or other improvements along that gravel road so long as it does not prevent Inman from “the reasonable use and enjoyment of the easement.” *Hundley v. Michael*, 105 N.C. App. 432, 435, 413 S.E.2d 296, 298 (1992). On appeal, the parties did not address the extent to which a gate or similar improvements to the Slacks’ property would impact Inman’s use and enjoyment of the easement, and we are unable to answer that question from the record before us.

Similarly, although property owners cannot unilaterally move the location of an express easement whose boundaries are recorded, *see A. Perin Dev. Co., LLC v. Ty-Par Realty, Inc.*, 193 N.C. App. 450, 452–53, 667 S.E.2d 324, 326 (2008), the parties did not address on appeal which portion of the gravel road Inman used and maintained, and thus in which he acquired a prescriptive easement. We therefore cannot adjudicate whether the Slacks, by shifting the gravel road slightly westward and building a fence along their property line, interfered with the reasonable use and enjoyment of the easement that Inman acquired through prescription.

We therefore vacate the trial court’s entry of a permanent injunction in favor of Inman and remand this matter to the trial court for further proceedings.

Conclusion

We reverse the trial court’s entry of summary judgment on the claims asserted by the Town of Carrboro, Town of Chapel Hill, and Orange County, and remand for entry of judgment in favor of Andrew and Bethany Slack on those claims. We affirm the entry of summary judgment in favor of William Inman on his prescriptive easement claim but vacate the trial court’s corresponding injunctive relief. We remand the matter for the trial court to determine what, if any, injunctive relief is appropriate in light of this opinion.

REVERSED IN PART; AFFIRMED IN PART; VACATED IN PART;
AND REMANDED.

Judges ELMORE and HUNTER, JR. concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 SEPTEMBER 2018)

APPERSON v. INTRACOASTAL REALTY CORP. No. 18-147	Pender (17CVS440)	Affirmed
BLUMENSCHN v. BLUMENSCHN No. 17-1299	Buncombe (15CVD2778)	Affirmed in Part, Dismissed in Part
CABARRUS CTY. BD. OF EDUC. v. BD. OF TRS., TEACHERS' & STATE EMPS.' RET. SYS. No. 17-1019	Wake (17CVS1986)	Affirmed
IN RE DE LUCA No. 17-1339	N.C. Utilities Commission (SP-100) (SUB32)	Affirmed
IN RE FORECLOSURE OF SDS INVS., LLC No. 18-133	Catawba (17SP156)	Affirmed
IN RE V.P.M.A. No. 17-1386	Wake (15JA57)	Affirmed
JOHNSTON CTY. BD. OF EDUC. v. BD. OF TRS. TEACHERS' & STATE EMPS.' RET. SYS. No. 17-1024	Wake (17CVS1624)	Affirmed
JOHNSTON CTY. BD. OF EDUC. v. DEP'T OF STATE TREASURER, RET. SYS. DIV. No. 17-1021	Wake (17CVS1524)	Affirmed
LETENDRE v. CURRITUCK CTY. No. 18-163	Currituck (17CVS146)	Reversed and Remanded
MALONE v. HUTCHISON-MALONE No. 18-220	Durham (06CVD2127)	Dismissed
MITMAN v. SHIPLEY No. 18-173	Wake (17CVD600783)	Reversed
SMITH v. N.C. BD. OF FUNERAL SERV. No. 17-996	Wake (16CVS15396)	Affirmed

STATE v. BARNES No. 18-134	Bertie (15CRS177)	No Error
STATE v. BROWN No. 18-52	Columbus (15CRS52691) (16CRS224)	Dismissed
STATE v. BRYANT No. 17-1201	Wake (15CRS202885) (15CRS203058) (15CRS203076) (15CRS203078) (15CRS203619) (15CRS204135)	Dismissed
STATE v. CATALDO No. 17-1296	Rockingham (11CRS50300-01) (11CRS50518)	Reversed and Remanded
STATE v. ERIKSEN No. 18-119	Wake (14CRS225053)	Affirmed
STATE v. FOWLER No. 17-723	Rutherford (13CRS50255-56) (13CRS50292) (13CRS50379-84)	Affirmed
STATE v. GAINNEY No. 17-1422	Forsyth (15CRS52678)	No Error
STATE v. HILL No. 18-15	Martin (15CRS50890-91)	Affirmed
STATE v. HOLLIFIELD No. 18-63	Henderson (15CRS54766)	NO ERROR IN PART; VACATED IN PART AND REMANDED
STATE v. INMAN No. 17-1408	Mecklenburg (15CRS243371) (15CRS243373)	Affirmed
STATE v. JILANI No. 18-123	Wake (14CRS6232)	No Error
STATE v. KELLY No. 18-194	Pasquotank (12CRS51951)	No Error
STATE v. LUNSFORD No. 17-1187	Wake (05CRS81735)	Reversed
STATE v. MAZUR No. 17-736	Wake (12CRS211095) (12CRS211096)	No Error

STATE v. MCGILL No. 18-33	New Hanover (16CRS000002) (16CRS1904)	Reversed
STATE v. MCKOY No. 17-1025	Guilford (09CRS99645)	No Error
STATE v. MILLER No. 17-1130	Guilford (15CRS74012)	No Error
STATE v. OGLES No. 18-210	Guilford (16CRS23193) (16CRS23194) (16CRS73464)	NO PREJUDICIAL ERROR.
STATE v. RINEHART No. 18-92	Burke (16CRS1231) (17CRS1296)	Remanded for resentencing
STATE v. SMITH No. 17-1401	Wake (14CRS228383)	Reversed
STATE v. SPIVEY No. 17-1312	Wake (16CRS207870)	Dismissed
STATE v. THABET No. 17-1417	Wake (16CRS201984)	Affirmed
STATE v. TRAUB No. 18-31	Cherokee (14CRS50824)	No Error
STATE v. VICKERS No. 18-35	Wake (14CRS211534)	DISMISSED AS MOOT
STATE v. WHITE No. 18-136	Onslow (16CRS54917-19)	No Error
STATE v. WHITEHEAD No. 17-1320	Pitt (12CRS52757-59) (12CRS52764)	No Prejudicial Error
UNION CTY. BD. OF EDUC. v. BD. OF TRS., TEACHERS' & STATE EMPs.' RET. SYS. No. 17-1023	Wake (17CVS1359)	Affirmed
UNION CTY. BD. OF EDUC. v. DEP'T OF STATE TREASURER, RET. SYS. DIV. No. 17-1022	Wake (17CVS1459)	Affirmed

WILKES CTY. BD. OF EDUC. v. BD. OF TRS., TEACHERS' & STATE EMPS.' RET. SYS. No. 17-1018	Wake (17CVS1649)	Affirmed
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WILKES CTY. BD. OF EDUC. v. DEP'T OF STATE TREASURER, RET. SYS. DIV. No. 17-1020	Wake (17CVS1580)	Affirmed
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CHÁVEZ v. WADLINGTON

[261 N.C. App. 541 (2018)]

EMILY SUSANNA CHÁVEZ, PLAINTIFF

v.

SERENA SEBRING WADLINGTON AND
JOSEPH FITZGERALD WADLINGTON, DEFENDANTS

No. COA18-93

Filed 2 October 2018

1. Appeal and Error—mootness—custody dispute—child reaching age of majority

An appeal in a custody action was dismissed as moot as to one child, because that child reached the age of eighteen during the pendency of the appeal and therefore was no longer a minor subject to custody disputes.

2. Child Custody and Support—standing—“other person”—third-party non-parent—significant relationship over extensive period of time—act inconsistent with parent’s constitutionally protected status

A third-party non-parent (plaintiff), who had been the live-in romantic partner of defendant-mother, lacked standing to seek custody of defendant-parents’ biological children conceived and born during defendants’ marriage. (Defendants had separated but never divorced.) Plaintiff’s relationship with the children ended more than a year before she filed the custody complaint, when she evicted the children and their mother from her home. Furthermore, plaintiff never alleged that either defendant was unfit or engaged in conduct inconsistent with his or her constitutionally protected status as a parent.

Judge ARROWOOD dissenting.

Appeal by plaintiff from order entered 28 August 2017 by Judge Fred Battaglia, Jr. in Durham County District Court. Heard in the Court of Appeals 7 August 2018.

Collins Family Law Group, by Rebecca K. Watts, for plaintiff-appellant.

No brief filed on behalf of pro se defendant-appellees.

CALABRIA, Judge.

CHÁVEZ v. WADLINGTON

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Emily Susanna Chávez (“plaintiff”) appeals from the trial court’s order dismissing her complaint for lack of subject matter jurisdiction pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2017). On appeal, plaintiff contends that the trial court erred by concluding that she lacked standing to seek custody of the biological children of Serena Sebring Wadlington and Joseph Fitzgerald Wadlington (collectively, “defendants”). After careful review, we affirm the trial court’s order.

I. Factual and Procedural Background

Serena Sebring Wadlington (“mother”) and Joseph Fitzgerald Wadlington (“father”) are the biological parents of B.J.W., born 10 February 2000, and C.A.W., born 5 January 2003. Both B.J.W. and C.A.W. (collectively, “the children”) were conceived and born during defendants’ marriage. Although defendants separated in 2007, they never divorced. Therefore, defendants are still married today and have shared physical and legal custody of the children without a court order.

Around the time defendants separated, plaintiff and mother entered into a “long-term, committed and exclusive relationship” that lasted approximately seven years. During this time, mother and plaintiff resided together, with the children, when the children were not residing with father. While plaintiff and mother could not legally marry for much of their relationship, mother did not seek a divorce from father and did not pursue a legal marriage with plaintiff after same-sex marriage was recognized in North Carolina. During their relationship, plaintiff assisted mother with her child-rearing duties such as taking the children to school, accompanying them to appointments and activities, assisting them with schoolwork, and purchasing necessities for the children and the household.

On 4 March 2015, plaintiff and mother separated when plaintiff left the residence she shared with mother and the children. On 10 July 2015, plaintiff filed an action to evict mother and the children, which was dismissed. Approximately two weeks later, while mother was away on a work-related trip and the children were at a family reunion with father, plaintiff used self-help to change the locks, removed all of mother’s and the children’s belongings from the house, and placed their belongings in a storage unit. Plaintiff subsequently contacted the children, then aged 12 and 15. However, the children were unwilling to continue a relationship with plaintiff.

On 4 November 2016, plaintiff filed a complaint against defendants in Durham County District Court seeking shared physical and legal custody of the children. Plaintiff alleged, *inter alia*, that she “was centrally

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involved in the care, upbringing and development” of the children during her relationship with mother, and that mother “intended to and did create a permanent parental relationship” between them. According to plaintiff, mother “acted inconsistently with her protected status as a parent by relinquishing her right to exclusive care and control of the minor children in granting parental status to [p]laintiff.” Plaintiff further alleged that it would be in the children’s best interests for plaintiff “to be involved in their lives on a regular basis.”

On 1 August 2017, defendants filed a motion to dismiss plaintiff’s complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Defendants asserted that the trial court lacked subject matter jurisdiction because plaintiff lacked standing to seek custody of the children and failed to allege that defendants were unfit or had acted inconsistently with their constitutionally protected status as parents.

Following a hearing, on 28 August 2017, the trial court entered an order granting defendants’ motion to dismiss. The court concluded, in pertinent part, that:

3. Plaintiff is not a parent and is not a *defacto* [sic] parent.
4. Defendants, as the biological and legal parents of the minor children, have a constitutionally protected right [to] the exclusive care, custody and control of their children under the Fourteenth Amendment to the Constitution of the United States.
5. Plaintiff has no standing to seek custody of Defendants’ children as an “other person” pursuant to N.C.G.S. § 50-13.1(a) and NC Caselaw, to wit:
 - a. Plaintiff has no relationship with the minor children;
 - b. Defendants and their children are an intact family, with no pending custody litigation between them;
 - c. Neither Defendant has neglected, abused, or abandoned his/her children; and
 - d. Neither Defendant has acted inconsistent with his/her constitutionally protected right as a parent.
6. Plaintiff has failed to allege or establish by clear and convincing evidence that either Defendant has engaged in conduct inconsistent with his/her constitutionally

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protected right as a parent or otherwise forfeited his/her constitutionally protected status as a parent.

Plaintiff appeals.

II. Standing

On appeal, plaintiff argues that the trial court erred in dismissing her complaint for lack of standing. We disagree.

A. Standard of Review

“[O]n a motion to dismiss the facts are viewed in the light most favorable to the nonmovant, giving them the benefit of all plausible inferences.” *Ellison v. Ramos*, 130 N.C. App. 389, 395, 502 S.E.2d 891, 895, *appeal dismissed and disc. review denied*, 349 N.C. 356, 517 S.E.2d 891 (1998). In custody cases, “the trial court’s findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary.” *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 268 (2003). “Unchallenged findings of fact are binding on appeal.” *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011). Standing is a question of law which this Court reviews *de novo*. *Perdue v. Fuqua*, 195 N.C. App. 583, 585, 673 S.E.2d 145, 147 (2009) (citation and quotation marks omitted).

B. Discussion

Subject matter jurisdiction is “a court’s power to hear a specific type of action, and is conferred upon the courts by either the North Carolina Constitution or by statute.” *Yurek v. Shaffer*, 198 N.C. App. 67, 75, 678 S.E.2d 738, 744 (2009) (citation and quotation marks omitted). “Standing is a necessary prerequisite to a court’s proper exercise of subject matter jurisdiction.” *Myers v. Baldwin*, 205 N.C. App. 696, 698, 698 S.E.2d 108, 109 (2010) (citation omitted). “Plaintiffs have the burden of proving that standing exists.” *Id.*

[1] In custody proceedings, standing is governed by N.C. Gen. Stat. § 50-13.1(a), which provides, in pertinent part, that “[a]ny parent, relative, or other person . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child[.]” Here, since plaintiff is neither a natural parent nor a relative of the children, she claims a right to custody as an “other person” pursuant to N.C. Gen. Stat. § 50-13.1(a). However, B.J.W. turned 18 years old on 10 February 2018, and is therefore no longer a “minor child” subject to custody disputes. *See* N.C. Gen. Stat. § 48A-2 (“A minor is any person who has not reached the age of 18 years.”). Accordingly, plaintiff’s appeal is

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moot with regards to B.J.W. and “should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.” *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). Therefore, we dismiss plaintiff’s appeal as to B.J.W. and consider plaintiff’s standing as an “other person” only insofar as C.A.W. is concerned.

[2] Despite the broad language of N.C. Gen. Stat. § 50-13.1(a), “our Supreme Court has indicated that there are limits on the ‘other persons’ who can bring” an action for custody. *Myers*, 205 N.C. App. at 698, 698 S.E.2d at 110 (citation and quotation marks omitted). The statute “was not intended to confer upon strangers the right to bring custody or visitation actions against parents of children unrelated to such strangers. Such a right would conflict with the constitutionally-protected paramount right of parents to custody, care, and control of their children.” *Petersen v. Rogers*, 337 N.C. 397, 406, 445 S.E.2d 901, 906 (1994).

“[T]he relationship between the third party and the child is the relevant consideration for the standing determination” in custody disputes between non-parent third parties and natural parents. *Ellison*, 130 N.C. App. at 394, 502 S.E.2d at 894. “[A] relationship in the nature of a parent and child relationship, even in the absence of a biological relationship, will suffice to support a finding of standing.” *Id.*

“No appellate court in North Carolina has attempted to draw any bright lines for how long the period of time needs to be or how many parental obligations the person must have assumed in order to trigger standing against a parent[.]” *Myers*, 205 N.C. App. at 699, 698 S.E.2d at 110 (citation and quotation marks omitted). However, the cases in which this Court has determined that a third party had standing to seek custody against a natural parent have “involved significant relationships over extensive periods of time.” *Id.*; *see, e.g., Moriggia v. Castelo*, __ N.C. App. __, __, 805 S.E.2d 378, 379, 389 (2017) (holding that the trial court erred by concluding that the plaintiff lacked standing to seek custody of a minor child born 11 June 2013 to the parties, “a lesbian couple who never married but [who] were in a committed and loving relationship from January 2006 until October 2014” and “decided during the relationship to have a child” together (internal quotation marks omitted)); *Mason v. Dwinnell*, 190 N.C. App. 209, 220, 660 S.E.2d 58, 65 (2008) (holding that the plaintiff had standing to pursue custody where she alleged that she and the defendant “jointly raised the child; they entered into an agreement in which they each acknowledged that [the plaintiff] was a *de facto* parent and had ‘formed a psychological parenting relationship with the parties’ child;’ and ‘the minor child has lived all

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his life enjoying the equal participation of both [the plaintiff] and [the defendant] in his emotional and financial care and support, guidance and decision-making’ ”); *Ellison*, 130 N.C. App. at 396, 502 S.E.2d at 895 (determining that the third-party plaintiff had standing to seek custody where she alleged that she was “the only mother the minor child has known” and that during her five-year relationship with the defendant-father, she “was the responsible parent . . . who took the minor child to her medical appointments, to school, attended teacher conferences, took the minor child for diabetic treatment and counseling, . . . and bought all the child’s necessities” (internal quotation marks omitted)).

Furthermore, a non-parent who seeks custody against a natural parent must also allege “some act inconsistent with the parent’s constitutionally protected status.” *Yurek*, 198 N.C. App. at 75, 678 S.E.2d at 744 (citations omitted). The acts alleged “*are not* required to be ‘bad acts’ that would endanger the children.” *Moriggia*, __ N.C. App. at __, 805 S.E.2d at 385 (citation and quotation marks omitted). But “absent a showing . . . that the natural parents are unfit, have neglected the welfare of the child, or have acted in a manner inconsistent with the paramount status provided by the Constitution, the [non-parent] does not have standing.” *Perdue*, 195 N.C. App. at 586-87, 673 S.E.2d at 148.

In the instant case, the trial court concluded that plaintiff lacked standing to seek custody of defendants’ children. The court found, in relevant part, that:

11. [Mother] is the biological and legal mother of the two minor children, who are at issue in this matter[.] . . . [Father] is the biological and legal father of said children, who were both conceived and born during the marriage of Defendants.

12. Defendants separated in December 2007, when their youngest child . . . was five (5) years old; however, the Defendants have never divorced, and remain married to one another.

13. Defendants have shared legal and physical custody of their minor children since their separation, in a peaceful and cooperative manner. They have agreed upon a custodial schedule, and have agreed on modifications to that schedule over the years when it was necessary. The Defendants have shared legal and physical custody of their children so well that it has never been necessary

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for either Defendant to seek a Court Order regarding the custody of their children.

....

17. Plaintiff was never a legal step-parent to Defendants' children. Initially, this was partially because that particular legal status was not available to her in North Carolina. However, after same-sex marriage was authorized and recognized in North Carolina, [Mother] did not divorce [Father] . . . to marry Plaintiff. Plaintiff merely remained the live-in romantic partner of Mother.

18. While residing together, Plaintiff assisted Mother with her daily child-rearing duties, such as voluntarily taking them to/from various appointments and activities, assisting them with schoolwork, and purchasing some necessities for the minor children. As such, Plaintiff was involved in the children[']s care and upbringing, and had a positive and healthy relationship with the children.

19. Plaintiff and Mother separated on March 4, 2015, when Plaintiff left the residence she shared with Mother and the children.

20. On or about July 10, 2015, Plaintiff filed a lawsuit to evict Mother and the children from the residence. Said action was dismissed. Shortly thereafter (approximately 2 weeks later), while Mother was away on a business trip and the children were with Father, Plaintiff used self-help to change the locks, and removed all of Mother's belongings and the children's belongings from their residence, and placed their items in storage. Plaintiff then moved back into the residence, once occupied by Plaintiff and Mother. At that point, the relationship between Plaintiff and the children ended.

....

24. After Plaintiff locked mother and the children out in July of 2015, Plaintiff did not seek to resume her relationship with the children. Since July 2015, Plaintiff has not had a relationship with the children.

25. Since each of their respective births, the children have always resided with Mother and/or Father. Neither Defendant has ever abandoned their children.

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. . . .

27. On its face, Plaintiff's Complaint fails to allege facts sufficient to give Plaintiff third-party standing to bring an action for custody.

28. In her Complaint filed on November 4, 2016, Plaintiff alleged facts consistent with a conclusion that she had a "parent-child relationship" with Defendants' children, while she and Mother resided together. Plaintiff then added conclusory statements (no factual allegations asserted) that [mother] had acted inconsistent with her parental rights, asserting that this Court had jurisdiction to decide custody of Defendants' children on the "best interests" standard.

29. Plaintiff did not and does not allege that either Defendant is unfit or has abandoned or neglected their children.

30. Neither Defendant is unfit or has abandoned or neglected their children.

31. Plaintiff did not and does not allege that Father has acted in a manner inconsistent with his constitutionally protected status as a parent.

32. Neither Defendant has acted in a manner inconsistent with his/her constitutionally protected status as a parent.

Plaintiff contends that she established standing as an "other person" pursuant to N.C. Gen. Stat. § 50-13.1(a) because she sufficiently alleged a parent-child relationship with the children. Plaintiff further contends that "[t]he issue of whether [defendants] acted inconsistently with their protected status is **not** relevant to the question of standing or to the issue of subject matter jurisdiction." Plaintiff is incorrect on both counts.

Taken as true and viewed in the light most favorable to plaintiff, the allegations in plaintiff's complaint demonstrate that she had a parent-child relationship with the children during her relationship with mother. We do not doubt that there was genuine love and affection between plaintiff and the children during those years; indeed, mother acknowledged as much during the hearing. Nevertheless, "standing is measured at the time the pleadings are filed." *Quesinberry v. Quesinberry*, 196 N.C. App. 118, 123, 674 S.E.2d 775, 778 (2009). Thus, "when standing is questioned, the proper inquiry is whether an actual

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controversy existed when the party filed the relevant pleading.” *Id.* (citation, quotation marks, and brackets omitted).

According to the trial court’s unchallenged findings of fact 20 and 24, plaintiff’s relationship with the children ended in July 2015 when she evicted them from the residence. This fact defeats plaintiff’s standing as an “other person.” Regardless of the parties’ prior relationship, “a third party who has no relationship with a child does not have standing under N.C. Gen. Stat. § 50-13.1 to seek custody of a child from a natural parent.” *Ellison*, 130 N.C. App. at 394, 502 S.E.2d at 894.

The dissent, however, contends that the fact that “plaintiff’s relationship with the children ended in July 2015 . . . does not prevent plaintiff from establishing a parent-child relationship for the purposes of standing in a child custody case.” According to the dissent,

[i]ntentions after the ending of the relationship between the parties are not relevant because the right of the legal parent does not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the party’s separation she regretted having done so.

Estroff v. Chatterjee, 190 N.C. App. 61, 70-71, 660 S.E.2d 73, 79 (2008) (citation, internal quotation marks, and alterations omitted).

Significantly, however, standing was not at issue in *Estroff*. *See id.* at 75 n.2, 660 S.E.2d at 81 n.2 (noting that “the trial court necessarily concluded twice that [the plaintiff] had standing, and there is no need for us to address the issue” where the trial court, “in its 3 August 2005 order, denied [the defendant’s] motion to dismiss for lack of standing and, in its 17 November 2006 order, concluded that it had personal and subject matter jurisdiction” (quotation marks and original emphasis omitted)). Furthermore, this portion of *Estroff* pertains not to *the existence* of a parent-like relationship between the third party and the minor child, but rather to *the method* by which the third party gained such authority—i.e., the issue of whether the natural parent has acted inconsistently with his or her constitutionally protected rights. *See id.* at 75, 660 S.E.2d at 81-82 (explaining that “the focus is not on what others thought of the couple or what responsibility [the plaintiff] elected to assume, but rather whether [the defendant] chose to cede to [the plaintiff] a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with her child” (citation, quotation marks, and original alterations omitted)).

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As the dissent recognizes, defendants' constitutionally protected parental rights and plaintiff's standing as an "other person" pursuant to N.C. Gen. Stat. § 50-13.1(a) are not wholly independent issues. The statute does not exist in a vacuum. *See Perdue*, 195 N.C. App. at 586, 673 S.E.2d at 148 ("While this Court recognizes that intervenor satisfies the definition of 'other person' because she was the primary caregiver since birth and she had a close familial relationship with the minor child, the grandmother is still required to allege parental unfitness."). However, the dissent conflates the significance of the constitutional issue as it relates to plaintiff's standing versus the merits of her custody claim. Although relevant to both inquiries, "standing is a threshold issue that must be addressed, and found to exist, before the merits of the case are judicially resolved." *Id.* at 585, 673 S.E.2d at 147 (citation and quotation marks omitted). As a non-parent third party, plaintiff lacks standing to seek custody unless she overcomes the presumption that defendants have "the superior right to the care, custody, and control" of the children. *Id.* at 586, 673 S.E.2d at 148 (citing *Petersen*, 337 N.C. at 403-04, 445 S.E.2d at 905).

Plaintiff failed to overcome this presumption. Plaintiff has never alleged that either defendant is unfit or has abandoned or neglected the children. According to the trial court's finding of fact 31, plaintiff's complaint does not allege that father acted inconsistently with his protected status as a parent. Therefore, even assuming, *arguendo*, that plaintiff alleged facts sufficient to overcome mother's *Petersen* presumption, father's rights as a natural parent remain superior to those of a non-parent. *Id.*; *see also Brewer v. Brewer*, 139 N.C. App. 222, 232, 533 S.E.2d 541, 549 (2000) ("[A] parent who voluntarily gave custody to the other parent and has never been adjudged unfit does not lose [their] *Petersen* presumption against a non-parent third party so long as the non-parent third party does not have court-ordered custody.").

Plaintiff also argues that the trial court's dismissal of her complaint for lack of subject matter jurisdiction was procedurally improper, in that certain of the court's findings are "relevant only to a Rule 12(b)(6) analysis." This elevates form over substance. As plaintiff recognizes, standing is necessary to survive motions to dismiss for lack of subject matter jurisdiction or failure to state a claim. *See Moriggia* __ N.C. App. at __, 805 S.E.2d at 384 ("Standing concerns the trial court's subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss." (citation and quotation marks omitted)); *see also Street v. Smart Corp.*, 157 N.C. App. 303, 305, 578 S.E.2d 695, 698 (2003) ("A lack of standing may be challenged by [a] motion to dismiss for

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failure to state a claim upon which relief may be granted.” (citation and quotation marks omitted)). However, regardless of the procedural posture in which the issue arises, “[i]f a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim.” *Perdue*, 195 N.C. App. at 587, 673 S.E.2d at 148 (citation and quotation marks omitted). “Without jurisdiction the trial court must dismiss all claims brought by the [plaintiff].” *Id.*

III. Conclusion

Plaintiff has not had a relationship with the children since July 2015. Furthermore, according to the trial court, plaintiff failed to allege or establish clear and convincing evidence that either defendant was unfit or engaged in conduct inconsistent with his or her constitutionally protected status as a parent. Therefore, the trial court did not err by concluding that plaintiff lacks standing to seek custody of the children, and we affirm the order dismissing her complaint for lack of subject matter jurisdiction. Since the issue of standing is dispositive, we need not address plaintiff’s remaining arguments.

AFFIRMED.

Judge MURPHY concurs.

Judge ARROWOOD dissents in a separate opinion.

ARROWOOD, Judge, dissenting.

The majority holds that the trial court did not err by dismissing Emily Susanna Chavez (“plaintiff”)’s complaint for shared custody of Serena Sebring Wadlington and Joseph Fitzgerald Wadlington (collectively, “defendants”)’s biological children pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure because it concluded plaintiff lacked standing to seek custody of C.A.W. I respectfully dissent.

I believe plaintiff alleged sufficient facts to have standing as to C.A.W. However, I offer no opinion as to whether she may ultimately prevail. “Standing concerns the trial court’s subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss. Our review of an order granting a Rule 12(b)(1) motion to dismiss is *de novo*.” *Moriggia v. Castelo*, 256 N.C. App. 34, 45, 805 S.E.2d 378, 384 (2017) (citation and internal quotation marks omitted). In determining standing, our Court “may consider matters outside the pleadings.”

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Harris v. Matthews, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007) (citations omitted).

Standing for an individual to bring an action for child custody is governed by N.C. Gen. Stat. § 50-13.1(a), which provides that “[a]ny parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided.” N.C. Gen. Stat. § 50-13.1(a) (2017). However, “there are limits on the ‘other persons’ who can bring such an action. A conclusion otherwise would conflict with the constitutionally-protected paramount right of parents to custody, care, and control of their children.” *Mason v. Dwinnell*, 190 N.C. App. 209, 219, 660 S.E.2d 58, 65 (2008) (internal quotation marks and citation omitted).

In *Ellison v. Ramos*, 130 N.C. App. 389, 502 S.E.2d 891 (1998), our Court held “that a relationship in the nature of a parent and child relationship, even in the absence of a biological relationship, will suffice to support a finding of standing.” *Id.* at 394, 502 S.E.2d at 894. Subsequently, our General Assembly mandated in N.C. Gen. Stat. § 50-13.2(a) “that disputes over custody be resolved solely by application of the ‘best interest of the child’ standard.” *Estroff v. Chatterjee*, 190 N.C. App. 61, 63, 660 S.E.2d 73, 75 (2008). However, before the best interest of the child standard can be used as between a legal parent and a third party, “our federal and state constitutions, as construed by the United States and North Carolina Supreme Courts” require that “the evidence establishes that the legal parent acted in a manner inconsistent with his or her constitutionally-protected status as a parent.” *Id.* at 63-64, 660 S.E.2d at 75 (citing *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997)). Thus, a party seeking custody must now “allege facts demonstrating a sufficient relationship with the child and then must demonstrate that the parent has acted in a manner inconsistent with his or her protected status as a parent.” *Moriggia*, __ N.C. App. at __, 805 S.E.2d at 385. Here, the majority holds that plaintiff failed to both (1) sufficiently allege a parent-child relationship with the children, and (2) allege facts sufficient to overcome the natural parents’ constitutionally protected status. I disagree.

I. Parent-Child Relationship

The majority first holds that plaintiff’s allegations, taken as true and viewed in the light most favorable to the plaintiff, demonstrate that she had a parent-child relationship with the children while in a relationship with defendant mother, but that plaintiff’s relationship with the children ended in July 2015 when she evicted them and their mother from the

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residence, and, thus, plaintiff did not sufficiently allege a parent-child relationship. Although our Court is bound by unchallenged findings of fact 20 and 24, that the plaintiff's relationship with the children ended in July 2015, this does not prevent plaintiff from establishing a parent-child relationship for the purposes of standing in a child custody case. We must also consider the parties' actions during the relationship of plaintiff and defendant mother, as:

the actions and intentions during the relationship of the parties, during the planning of the family, and before the estrangement carry more weight than those at the end of the relationship since . . . “[i]ntentions after the ending of the relationship between the parties are not relevant because the right of the legal parent does not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the party's separation she regretted having done so.”

Moriggia, 256 N.C. App. at 50-51, 805 S.E.2d at 387 (quoting *Estroff*, 190 N.C. App. at 70-71, 660 S.E.2d at 79 (citation and internal quotation marks omitted)). Although *Moriggia* considers whether the natural parent acted inconsistently with his or her paternal rights so as to establish standing, I would hold that the fact that a legal parent does not have the right to erase a parent-child relationship between her partner and her child which she created and fostered during the relationship is also relevant here.

Here, plaintiff alleges, and the trial court found as fact, that she was in a long-term, committed, and exclusive relationship with defendant mother for approximately seven years, making public vows of commitment in May 2012. Plaintiff alleged she was “involved in the care, upbringing and development of the minor children throughout her relationship with” defendant mother, and that it was defendant mother's intent to create a permanent relationship between plaintiff and the children. She also alleged that she “and [d]efendant [m]other publically held themselves out as the . . . children's parents[,]” and defendant mother delegated parental responsibilities to plaintiff, including: taking the children to appointments and activities, assisting with schoolwork, providing emotional stability, having decision-making authority regarding the children, and purchasing necessities for the children. I would hold that these allegations, taken as true and in the light most favorable to plaintiff, are sufficient to establish plaintiff had a parent-child relationship with defendants' children.

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Nonetheless, the majority holds that these allegations are irrelevant to our inquiry because “standing is measured at the time the pleadings are filed,” see *Quesinberry v. Quesinberry*, 196 N.C. App. 118, 123, 674 S.E.2d 775, 778 (2009), and the trial court found plaintiff’s relationship with the children ended in July 2015 once they were evicted from plaintiff’s house. However, considering whether plaintiff had a parent-child relationship with defendants’ children before plaintiff’s separation from defendant is not contrary to the principle that “standing is measured at the time the pleadings are filed[,]” *id.*, as “the right of the legal parent does not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the party’s separation she regretted having done so.” *Moriggia*, 256 N.C. App. at 50, 805 S.E.2d at 387 (citation, internal quotation marks, and emphasis omitted).

Accordingly, I would hold that defendant mother cannot erase the parent-child relationship by removing the children from plaintiff’s life after her separation from plaintiff. Therefore, our Court should also consider the parent-child relationship that existed before the termination of plaintiff and defendant mother’s relationship led to the eviction of defendant and the children from plaintiff’s house and plaintiff’s inability to maintain her relationship with the children. As a result, I would hold that plaintiff’s allegations, taken as true and in the light most favorable to plaintiff, are sufficient to establish plaintiff had a parent-child relationship with defendants’ children.

II. Actions Inconsistent with Parental Rights

Although plaintiff incorrectly alleges on appeal that she does not need to allege that defendants acted inconsistently with their parental rights to establish standing, she also argues in the alternative that her allegations demonstrate that defendants acted inconsistently with their protected status as a parent by relinquishing their right to exclusive care and control of the children by granting plaintiff parental rights when defendant mother voluntarily and intentionally created a family unit and “a parent-like relationship between [p]laintiff and the” children.

In *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), our Supreme Court held “that absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail” in a dispute with a non-parent. *Id.* at 403-404, 445 S.E.2d at 905. However, “[i]n *Price*, the Supreme Court expanded on what constitutes unfitness or neglect by holding that conduct inconsistent

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with a parent's constitutionally protected status would lead to the application of the best interests of the child standard." *Brewer v. Brewer*, 139 N.C. App. 222, 229, 533 S.E.2d 541, 547 (2000) (citing *Price*, 346 N.C. at 79, 484 S.E.2d at 534). Our Court has held that a parent acts inconsistently with his or her protected status as a parent by relinquishing the right to exclusive care and control of a child by granting parental status to a third party. *Estroff*, 190 N.C. App. at 70, 660 S.E.2d at 78 (citation omitted). Thus, when a legal parent invites a third party into a child's life and cedes to the third party a significant amount of parental responsibility, the parent cannot later "assert those rights in order to unilaterally alter the relationship between her child and the person whom she transformed into a parent." *Id.* (citation omitted).

Here, plaintiff's allegations and the trial court's uncontested findings of fact tend to show that plaintiff and defendant mother were in a committed relationship and raised defendant mother's children together for five years. They lived as a family unit until the relationship ended. When they ultimately separated, defendant mother's intentions changed, but she had already created a family unit that included plaintiff. Thus, I would hold plaintiff alleged facts sufficient to overcome the mother's *Petersen* presumption.

However, the majority holds that even assuming *arguendo*, plaintiff alleged facts sufficient to overcome defendant mother's *Petersen* presumption, the trial court found that plaintiff's complaint does not allege the father acted inconsistently with his protected status; thus, the father's rights remain superior to those of a non-parent. The majority relies on *Brewer* to support this holding.

In *Brewer*, the biological father of two children entered into a consent order with the children's biological mother that granted him custody. *Brewer*, 139 N.C. App. at 224, 533 S.E.2d at 544. Thereafter, the father unilaterally allowed the children to live with their paternal aunt and uncle. *Id.* The biological mother was unaware of this change. *Id.* at 231, 533 S.E.2d at 548. Subsequently, the paternal aunt and uncle filed an action to obtain permanent legal custody of the children. *Id.* at 224, 533 S.E.2d at 544. The trial court granted the paternal aunt and uncle temporary custody in an *ex parte* order. *Id.* The biological mother then moved to vacate this order, asking the court to grant her custody of the children. *Id.* The court awarded the biological mother custody of the children. *Id.* The paternal aunt and uncle appealed. *Id.*

In reviewing the trial court's decision, the Court was careful to distinguish the case from cases where "a parent loses her *Petersen*

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presumption if she loses custody to a non-party in a court proceeding or consent order.” *Id.* at 230, 533 S.E.2d at 548. Moreover, the Court specified the case did “not present a question where the moving parent either voluntarily or involuntarily lost custody to a non-parent third party. [The biological mother] never surrendered custody of her children to the non-parent plaintiffs . . . [she], through no fault of her own was unaware where the children were.” *Id.* at 231, 533 S.E.2d at 548.

In light of the circumstances before it, the Court held: a natural parent should maintain her “*Petersen* presumption against a non-parent where the parent had voluntarily relinquished custody to the other parent, had never voluntarily or involuntarily relinquished custody to a non-parent, had never been adjudged unfit, and had never acted in a manner inconsistent with her protected parental status.” *Id.* at 232, 533 S.E.2d at 548. The Court then specifically emphasized this holding “is limited *strictly* to the facts presented by this case.” *Id.* at 232, 533 S.E.2d at 549 (emphasis added).

Our Court’s caution in limiting *Brewer* is well-justified, given that “cases in this area present a vast number of unforeseen fact patterns.” *Id.* (citing *Ellison*, 130 N.C. App. at 395, 502 S.E.2d at 894-95). Thus, I believe that relying on *Brewer* in a case where the defendant father saw the children regularly and “never abandoned” the children during the course of defendant mother’s relationship with plaintiff impermissibly expands *Brewer*, a case where the biological mother was unaware the children were living with non-parents through no fault of her own.

Admittedly, the complaint in this case fails to specifically allege that defendant father abrogated his constitutionally protected status. However, our Court may look outside the pleadings in reviewing a Rule 12(b)(1) ruling. *Harris*, 361 N.C. at 271, 643 S.E.2d at 570; see *Cunningham v. Selman*, 201 N.C. App. 270, 280, 689 S.E.2d 517, 524 (2009) (“Unlike a Rule 12(b)(6) dismissal, the court need not confine its evaluation of a Rule 12(b)(1) motion to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing.” (citation, quotation marks, and alterations omitted)).

Here, the trial court held an evidentiary hearing, during which plaintiff repeatedly contended that both parents abrogated their constitutionally protected status by granting her the status of a parent. The trial court called defendant mother to the stand on the issue of standing. Defendant mother testified that she and plaintiff co-parented the children for five years, and that defendant father “had a good relationship with the children” at all times. She stated he “is the other primary

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parent to them” and saw the children regularly while she was in a relationship with plaintiff. Thus, the record makes it evident that defendant father was in a position to know that defendant mother held plaintiff out as a parent, and also intentionally created a parent-child relationship between plaintiff and the children.

This evidence and plaintiff’s allegations at the hearing undermine a key finding of fact in the trial court’s order that “[p]laintiff did not and does not allege that Father has acted in a manner inconsistent with his constitutionally protected status as a parent.” Moreover, I would hold that the pleadings and defendant mother’s testimony was sufficient to show by clear and convincing evidence that defendant father acted in a manner inconsistent with his constitutionally protected status because, unlike *Brewer*, he was in circumstances where it was apparent defendant mother created a parent-child relationship with plaintiff and his children. Despite this change, defendant father never took issue with the custody arrangement, sharing custody “in a peaceful and cooperative manner” with defendant mother since their separation.

Based on the circumstances before the Court, I would hold plaintiff had standing to seek custody of C.A.W. Accordingly, I would reverse the trial court’s order dismissing for lack of subject matter jurisdiction.

WILLIAM S. CREWS, JR., PLAINTIFF
v.
NYSA MARINDA PAYSOUR, DEFENDANT

No. COA18-72

Filed 2 October 2018

Child Custody and Support—child support—frustration of appellate review—need for evidentiary hearing—failure to address all claims

The Court of Appeals vacated a child support order and remanded the matter for a new evidentiary hearing where the trial court failed to conduct sufficient evidentiary proceedings to support its findings and conclusions, made mathematical errors in its order, failed to address all of the mother’s claims, and failed to make necessary findings for the mother’s attorney fees claim.

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Appeal by defendant from orders entered 7 August 2017 by Judge G. Galen Braddy in District Court, Pitt County. Heard in the Court of Appeals 5 September 2018.

Kurtz Evans Whitley Guy & Simos, PLLC, by Jon B. Kurtz, for plaintiff-appellee.

Tharrington Smith, LLP, by Steve Mansbery, for defendant-appellant.

STROUD, Judge.

Defendant appeals from an order establishing child support. The trial court limited the presentation of evidence based upon a misapprehension of the law at the only evidentiary hearing held in this case and received no additional evidence on remand, and both parties have requested remand based upon several errors in the order. The trial court also made findings of fact and conclusions of law on remand regarding the time period after the hearing without receiving any new evidence. We vacate the order and remand for a new evidentiary hearing and new order establishing child support and addressing the other issues discussed below, including birth expenses, attorney fees, and any reimbursement or arrears of past prospective child support payments needed based upon plaintiff-father's actual payments made prior to the hearing on remand and the child support as established by the new order on remand.

I. Background

The background of this case may be found in *Crews v. Paysour*,

Plaintiff William S. Crews, Jr. and Defendant Nysa Marinda Paysour are the parents of a minor child, but were never married. On 7 March 2012, Crews filed a complaint for child custody and child support. On 13 August 2012, the trial court entered an order for child support titled "Temporary IV-D Order" which stated this order is a temporary order for support by consent of parties and that both parties shall return to court

Applying the North Carolina Child Support Guidelines, the court ordered Crews to pay \$898.00 per month in child support. This figure was based on Crews's gross monthly income of \$4,331.67.

____N.C. App. ____, ____, 797 S.E.2d 380, *2-3 (March 21, 2017) (COA16-604) (unpublished) (quotation marks and brackets omitted) ("*Crews I*").

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Defendant-mother (“Mother”) and plaintiff-father (“Father”) were in medical school when a temporary child support order was entered in 2012; the income of both parties increased substantially after they completed their residencies.

On 5 May 2014, Paysour filed a notice of hearing for permanent child support and permanent custody. The trial court held that hearing on 30 September 2014 and heard evidence on the parties’ incomes, expenses and other information relevant to the award of child support. After the hearing, the trial court sent a letter dated 4 December 2014 to the parties’ counsel with a “Rendition of Judgment” from the child support hearing but not a written order awarding permanent child support.

Ultimately, the parties scheduled a conference with the court on 22 October 2015 regarding the entry of a written child support order. At the conference, the parties discussed the 4 December 2014 letter from the court and their draft proposed orders. The parties later submitted additional proposed orders and objections.

On 7 December 2015, the trial court entered a permanent child support order. In the order, the trial court made findings regarding both parties’ incomes and expenses. The trial court ordered Crews to pay \$3,037.00 per month in child support prospectively, and \$23,529.00 in child support arrears for the period from December 2014 through October 2015, to be paid in monthly installments of \$750.00. Crews timely appealed.

Id. at *3-4.

Crews I was based upon Father’s appeal from the 7 December 2015 child support order but it did not address all of the issues he raised. *See id.* at *5-7. Mother conceded some errors argued by Father in his appeal. *See id.* at *6. *Crews I* did not address the details of Father’s “series of arguments concerning the trial court’s findings and resulting calculations concerning his child support obligations.” *Id.* at *5.

The first issue addressed in *Crews I* was Father’s argument regarding the trial court’s subject matter jurisdiction to modify child support award; we determined the trial court had subject matter jurisdiction to act. *See id.* at *4-5. The second issue addressed in *Crews I* was the calculation of non-guideline child support, but instead of addressing the details

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of Father's arguments regarding the findings of fact of the numbers used in the calculation and how the support was calculated, we vacated the child support order and remanded for entry of a new order "because the trial court's order expressly indicate[d] that the court was operating under a misapprehension of the law—a fact conceded by [Mother] on appeal." *Id.* at *5-6. This Court did not address the details of the arguments regarding the actual calculation of the child support, because "[t]he trial court's analysis of those issues may be different when applying the proper legal standard for a child support award in a high-income case such as this one." *Id.* at *7. We also directed that "[o]n remand, the trial court is free to decide, in its discretion, whether additional evidence or a hearing is necessary, or whether the case may be decided based on the existing record." *Id.* On remand, the trial court did not receive any additional evidence, but counsel for both parties presented arguments regarding their proposed calculations of child support.

Mother appealed from the order on remand, and once again, in this appeal, although Mother is now the appellant and Father did not cross appeal, both parties note various errors in the trial court's calculation of child support, and Father concedes that the order must be remanded at least on some issues.

It is apparent from the record that much of the difficulty in this child support order was caused by the delay in entry of an order, and certainly the passage of more time for appeals has only made matters worse. The child support hearing was held on 30 September 2014; this was the only evidentiary hearing. On 22 October 2015, a hearing was held to address the fact that it was thirteen months after the hearing and no order had been entered. The first order was entered 7 December 2015, over a year after the hearing. The order on remand was entered almost three years after the hearing. At the time of this opinion, over four years have passed since the hearing. Based upon the variety of issues arising from the trial court's order and the need to remand, we will address a few key concerns of this Court.

II. Lack of Competent Evidence

Here, the trial court did not receive any evidence on remand, but despite the lack of evidence entered findings of fact regarding child support payments. Mother challenges these findings of fact as unsupported by the evidence, and since the only evidentiary hearing was in September 2014, any findings about any events after September 2014 are obviously unsupported by the record. At the hearing on remand in May of 2017, the trial court discussed the child support payments since the

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first order with counsel and counsel informed the court about these payments since the prior order. And although counsel *discussed* the issue with the trial court, the parties did not stipulate to amounts paid since the prior order or agree on how any overpayment by Father should be addressed. And arguments of counsel are not evidence: “[I]t is axiomatic that the arguments of counsel are not evidence.” *Basmas v. Wells Fargo Bank, Nat. Ass’n*, 236 N.C. App. 508, 513, 763 S.E.2d 536, 539 (2014)(citation and quotation marks omitted).

Father argues that *Crews I* left it in the trial court’s discretion as to whether to receive additional evidence on remand, so the trial court properly made findings addressing the time period after the evidentiary hearing. But when this Court leaves the matter of receiving additional evidence to the discretion of the trial court, this does not mean that the trial court can make findings of fact regarding something not addressed by the evidence at the hearing. It is equally axiomatic that findings of fact must be based upon competent evidence. *See Romulus v. Romulus*, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011) (“[W]hen the trial court sits without a jury, the standard of review on appeal is *whether there was competent evidence to support the trial court’s findings of fact* and whether its conclusions of law were proper in light of such facts.” (emphasis added) (citations and quotation marks omitted)). When we leave it in the discretion of the trial court as to whether to receive additional evidence on remand, we mean only that the trial court *may* receive additional evidence on remand if it determines this would be helpful, but the trial court is not *required* to receive additional evidence on remand. *See generally Holland v. Holland*, 169 N.C. App. 564, 572, 610 S.E.2d 231, 237 (2005). (“Additionally, on remand, the trial court shall rely upon the existing record, but may in its sole discretion receive such further evidence and further argument from the parties as it deems necessary and appropriate to comply with the instant opinion.” (citation and quotation marks omitted)). Since the trial court is aware of the circumstances at the time of remand, and we are not, we often leave this decision to the trial court’s discretion because it is in a better position to determine how to proceed.

In other cases, we limit the trial court’s discretion to some extent. For example, we recognize the possibility that sometimes counsel for the parties may agree on certain issues after remand so that no additional evidence is needed. We may also allow the parties to determine if they need to present additional evidence. *See, e.g., Lasecki v. Lasecki*, 246 N.C. App. 518, 543, 786 S.E.2d 286, 304 (2016) (“We therefore remand the case to the trial court for further proceedings consistent with this

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opinion and direct that if either party requests to present additional evidence for the trial court's consideration on remand as may be needed to address the issues discussed in this opinion, the trial court shall allow presentation of evidence, although the trial court may in its discretion set reasonable limitations on the extent of new evidence presented."). And further, because of the specific issues addressed by the opinion, sometimes we do expressly require additional evidence on remand. *See, e.g., Dixon v. Dixon*, 67 N.C. App. 73, 79, 312 S.E.2d 669, 673 (1984) ("We do hold, however, that the nature of child abuse, it being such a terrible fate to befall a child, obligates a trial court to resolve any evidence of it in its findings of fact. This was not done and the order is therefore vacated and the case remanded for a new hearing on the issue of custody.") And in other cases, where the record contains sufficient evidence to support the findings of fact and conclusions of law the trial court must make on remand, the trial court must make the required findings based upon the existing record without taking further evidence. *See, e.g., Carpenter v. Carpenter*, 225 N.C. App. 269, 279, 737 S.E.2d 783, 790 (2013) ("On remand, the trial court shall make additional findings of fact based upon the evidence presented at the trial." (footnote omitted)).

But in any case, including this one, if no additional evidence is presented on remand, the trial court can make its findings of fact and conclusions of law only based upon the *existing record*. The order on remand can address only the facts as of the last date of the evidentiary hearing because that is the only evidence in the record. Evidence is always required to support findings of fact, unless the parties have stipulated to the fact or the finding is subject to judicial notice, neither of which is present here.¹ Thus, we cannot review the order to determine if the findings of fact are supported by the evidence because there is no competent evidence for the time period covered by those findings of fact.

We also note this case is unusual, particularly for a non-guideline child support case, because during the September 2014 hearing, the parties presented little evidence regarding their living expenses, minimal

1. "N.C. Gen. Stat. § 8C-1, Rule 201 controls when the court may take judicial notice of adjudicative facts. Rule 201 provides that a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. A fact is considered indisputable if it is so well established as to be a matter of common knowledge. Conversely, a court cannot take judicial notice of a disputed question of fact." *Hensey v. Hennessy*, 201 N.C. App. 56, 68-69, 685 S.E.2d 541, 550 (2009) (citations and quotation marks omitted).

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evidence regarding the child's needs and expenses, and they were only allotted thirty minutes each. Upon review of the entire transcript and proceedings on remand, we are concerned that the trial court's misapprehension of the law, as discussed in *Crews I*, see *Crews I*, at *5-6, also caused the trial court to limit the evidence presented at the hearing. The trial court was "mistaken in Finding of Fact number 14 wherein the court cited *Loosvelt v. Brown* as standing for the proposition that the amount of child support awarded could not be in an amount lower than the maximum basic child support obligations." *Id.* at *6 (quotation marks and ellipses omitted). In other words, based upon its misinterpretation of *Loosvelt*, the trial court determined the guideline calculation addressed all of the usual and ordinary living expenses of the child, so evidence was needed only to address any needs above those basic needs deemed extraordinary expenses. At the beginning of the hearing, the trial court stated this limitation on the evidence:

The Court: -- and I -- I gave, for the parties, I gave them the minimum standard amount under the law based upon your combined incomes is -- the reasonable needs of the child under the Guidelines will be \$2,059. That means that's what the Guidelines will say for a combined income of \$25,000. Now, reasonable needs is going to have to be proven beyond that 2,059 for me to consider something more 'cause I can lean on that very heavily, even the Guidelines say that, so that's going to kind of be the issue I'm going to be looking at, can it be established, you know, more than 2,059, so, each side is going to have 30 minutes, and that includes witnesses, opening, closing. Do either of y'all want to make an opening or you just want to get right to your evidence?

(Emphasis added).

Thus, in the hour of evidence and argument, the parties presented the evidence as the trial court directed, and almost no evidence of the ordinary living expenses and needs of the child. This case did begin as a guideline child support case, since in 2012, both parties had lower incomes. See *id.* at *2. Although now this is a high-income case, the only financial affidavit in our record is the one-page "Child Support Financial Affidavit," which includes only the numbers required to calculate guideline child support: monthly gross income; pre-existing child support payments; responsibility for other children; work-related child care costs; health insurance premium costs for the child; and other "extraordinary

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[c]hild-[r]elated expenses.”² As directed by the trial court at the beginning of the hearing, much of the evidence was about the extraordinary expenses such as Father’s travel costs and lessons for soccer, music, and swimming. Accordingly, the misapprehension of law may explain the evidence, and lack thereof, in the record.

In a non-guideline child support case, the trial court must consider the needs of the child, specifically based upon the “accustomed standard of living” of that child, and must make findings of fact to address these needs:

where the parties’ income exceeds the level set by the Guidelines, the trial court’s support order, on a case-by-case basis, must be based upon the interplay of the trial court’s conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount. The determination of a child’s needs is largely measured by the accustomed standard of living of the child.

Smith v. Smith, 247 N.C. App. 135, 145–46, 786 S.E.2d 12, 21 (2016) (citations and quotation marks omitted). On remand, based upon the evidence presented at the original hearing and on remand, the new order should include the required findings of fact to address the financial circumstances of both parties and the reasonable needs of the child.

III. Effect of Holding of *Crews I*

And we have one more general concern. Based upon the trial court’s comments, the trial court may have been under the impression that because this court vacated and remanded the first order, we approved Father’s arguments regarding various findings in the first order, including the amounts of travel costs and medical insurance costs challenged by Mother in this appeal. In other words, this appeal is largely a mirror image of the last appeal on these issues. Father was the appellant from the first order and challenged certain findings, *see Crews I*, *1-7,

2. The entry for “[p]re-existing [c]hild [s]upport [p]ayments” on this form by Father was likely the reason for the trial court’s error in the first order, since Father listed his temporary child support obligation for this child. The pre-existing child support payments as intended on the affidavit would be a child support obligation for *another* child of the parent completing the affidavit. There is no evidence of other child support obligations or other children. In the *Crews I* order, the trial court found that “The Plaintiff should also get half credit for existing child support payments of \$898.00 per month, or \$450.00 rounded up.” But \$898.00 was Father’s temporary child support obligation, not support for another child.

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and Mother was the appellant in *this* appeal and challenged findings on some of those same issues, since the findings are in accord with Father's arguments in the first appeal. But this Court did not address the findings of fact in *Crews I*; we addressed only the legal error. *See id.* at *7. So *if* the trial court made any findings in the order on appeal based upon the belief this Court tacitly approved Father's arguments in *Crews I*, the trial court again made the findings of fact under a misapprehension of the law of the case.

IV. This Appeal

Finally, we have reviewed Mother's arguments in this appeal, and, without addressing each in detail, some have merit, including obvious mathematical errors in the order.

A. Mathematical Errors

The trial court noted in the findings it would allocate half of the cost of Mother's lease and car payment to the child's needs but actually included the entire amount. Also, the trial court found it would allocate the parties' responsibility for the child's needs based upon their percentages of the total income, so 53.41% of the child's support would be allocated to Mother and 46.59% to Father. But the trial court gave Father a "credit" against his percentage of the child's expenses for the full amount of the travel expenses for visitation, which means that Mother bears responsibility for 100% of the travel expense, not her percentage based upon her income. Although we do not endorse the arguments on appeal of either party on the correct calculations of the medical insurance costs and travel expenses, these calculations were issues in both appeals and in the order after remand, the trial court should make its findings and mathematical calculations on these issues clear.

B. Pregnancy and Birth Expenses

Mother brought a counterclaim for the expenses under North Carolina General Statute § 49-15, and Father concedes she presented evidence of these expenses at the trial. The trial court did not address this claim at all, and again even Father concedes the trial court "should have . . . addressed" the issue. On remand, the trial court shall address this claim.

C. Attorney Fees

Mother also sought attorney fees in her answer and counterclaims. The trial court made only two findings regarding her claim for attorney fees:

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38. Defendant submitted an Attorney Fee Affidavit which contained billing for this proceeding as well as evidence of counsel fees paid to Attorney Amy Edwards during the prior proceeding in this cause.
39. Since both parties appear to be on fairly equal status as to their abilities to provide for the child, the Court declines to award counsel fees in this matter.

Mother argues that the “trial court erred by failing to make adequate findings of fact and any conclusions of law regarding [Mother’s] claim for attorney’s fees.”

In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney’s fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. *Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding*; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney’s fees to an interested party as deemed appropriate under the circumstances.

N.C. Gen. Stat. § 50-13.6 (2011) (emphasis added).

Although the amount of an award of attorney fees is in the trial court’s discretion, whether Mother has met the statutory requirements for an award of attorney fees is a question of law. *See Atwell v. Atwell*, 74 N.C. App. 231, 237, 328 S.E.2d 47, 51 (1985) (“While whether the statutory requirements have been met is a question of law, reviewable on appeal, the amount of attorney’s fees is within the sound discretion of the trial judge and is only reviewable for an abuse of discretion.”) The trial court did not make the required findings of fact to allow us to review the denial of attorney fees, and findings of fact are required to show the basis for either the award or denial of attorney fees:

Where an award of attorney’s fees is prayed for, but denied, the trial court must provide adequate findings

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of fact for this Court to review its decision. Although the trial court denied Ms. Diehl's request for attorneys' fees, it made no findings relating to that denial, such as whether Ms. Diehl acted in good faith or whether she had insufficient means to defray the expense of the suit. Consequently, we must remand for entry of proper factual findings to support the trial court's decision regarding Ms. Diehl's request for attorneys' fees.

Diehl v. Diehl, 177 N.C. App. 642, 653, 630 S.E.2d 25, 32 (2006) (citation and quotation marks omitted).

Under North Carolina General Statute § 50-13.6, the trial court must make findings addressing (1) whether mother is an interested party; (2) whether she was acting in good faith; (3) whether she had insufficient means to defray the expenses of the suit; and (4) whether the party ordered to pay support. Here, Father refused to provide support adequate under the circumstances *existing at the time of institution of the action*. See N.C. Gen. Stat. § 50-13.6. The trial court's findings should address each of these four factors. See *Gibson v. Gibson*, 68 N.C. App. 566, 575, 316 S.E.2d 99, 105 (1984) ("Under the principles set forth in *Hudson*, *supra*, however, this action is one for support only and the additional finding requirement of G.S. 50-13.6 is thereby invoked. Our examination of the judgment discloses that the trial court did not find that plaintiff has refused to provide adequate support under the circumstances existing at the time the action was initiated. Such a finding is required in order to award attorney's fees in this case. Its absence compels us to vacate the award of attorney's fees and remand this case for additional findings as required by G.S. 50-13.6. We note incidentally that the expenses on which the award of counsel fees was based appear to relate solely to defendant's child support claim.")

Based upon the evidence, it appears Mother may have met the "statutory requirements of G.S. Sec. 50-13.6" but the trial court made no findings on these factors. *Atwell*, 74 N.C. App. at 237, 328 S.E.2d at 51. Mother presented evidence that at the time of institution of this action, she was still in medical school, receiving public assistance, and had a much lower income. In fact, the initial child support order against Father was entered in a IV action brought on Mother's behalf. Mother testified that she had to borrow money from her brother to pay her attorney fees.

On remand, the trial court may either allow or deny an award of attorney fees in its discretion, but it still must make the findings of fact required for appellate review. See *Diehl*, 177 N.C. App. at 653, 630 S.E.2d

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at 32. The trial court must consider whether Mother was “unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit. If the action is for child support alone, there must be an additional finding that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the proceeding.” *Belcher v. Averette*, 152 N.C. App. 452, 454-55, 568 S.E.2d 630, 632 (2002) (citations and quotation marks omitted). The trial court made no findings about whether Father had provided “support which is adequate under the circumstances existing at the time of the institution of the proceeding” or Mother’s ability to employ counsel to defend against Father in this action. *Id.* On remand, the trial court shall make findings of fact regarding Mother’s claim for attorney fees under North Carolina General Statute § 50-13.6, keeping in mind that it *must* consider the circumstances at the time of institution of the action, as to whether Father was providing support adequate *under the circumstances at the time of institution of the proceeding*, and may also consider current circumstances in its discretion. *See generally id.* We express no opinion on whether the trial court should or should not award attorney fees; that decision is in the trial court’s discretion. But whatever the decision, the trial court must make the required findings of fact for either a denial of attorney fees or an award of attorney fees.

D. Summary

Based upon the lack of an evidentiary hearing since September 2014, possible misinterpretations of *Crews I*, the mathematical errors, the failure to address all of Mother’s claims, and the failure to make necessary findings of fact for Mother’s attorney fee claim, we must vacate the order and remand for a new order without addressing the substance of each argument on appeal because as noted by *Crews I*, “[t]he trial court’s analysis of th[e] issues may be different when applying the proper legal standard [and considering the new evidence] for a child support award in a high-income case such as this one.” *Crews I* at *7.

V. Conclusion

We vacate the order and remand for a new trial on all issues. The parties may rely upon the evidence presented at the September 2014 hearing but may also present additional evidence for the entire time period covered by the hearing, from March 2012, the date the child support claim was filed, to the date of the hearing on remand. We note based upon the arguments on appeal, the trial court should clarify its

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calculations of certain expenses. The trial court shall then enter a new order addressing all of the claims and issues.

VACATED and REMANDED.

Judges ZACHARY and MURPHY concur.

STARLA N. FAIRFIELD AND LENNY FAIRFIELD, HUSBAND AND WIFE, PLAINTIFFS
v.
WAKEMED, ALSO DOING BUSINESS AS WAKEMED HEALTH & HOSPITALS;
MARSHA M. SMITH, M.D.; BENJAMIN GERMAN, M.D.; CHUDARATNA BHARGAVA, M.D.;
AND JOHN & JANE DOE MEDICAL STAFF, DEFENDANTS

No. COA18-295

Filed 2 October 2018

1. Medical Malpractice—pleadings—Rule 9(j)—review of all medical records

Where plaintiffs’ Rule 9(j) certification in their medical malpractice complaint stated that their proposed expert witness had reviewed “certain”—instead of “all”—medical records pertaining to the alleged negligence, the trial court properly dismissed the complaint for noncompliance with Rule 9(j).

2. Appeal and Error—abandonment of issues—citation of legal authority

Where plaintiffs argued that the trial court’s dismissal of their malpractice complaint pursuant to Rule 9(j) violated their due process rights but they failed to cite any legal authority to support their argument, the Court of Appeals deemed the issue abandoned.

Appeal by plaintiff from order entered 16 November 2017 by Judge W.O. Smith, III in Wake County Superior Court. Heard in the Court of Appeals 5 September 2018.

Michael A. Jones for plaintiffs-appellants.

Cranfill Sumner & Hartzog LLP, by Carl Newman and Katherine Hilkey-Boyatt, for defendants-appellees.

DAVIS, Judge.

FAIRFIELD v. WAKEMED

[261 N.C. App. 569 (2018)]

In this case, we must once again determine the effect of a litigant's failure to fully comply with the pleading requirements imposed by Rule 9(j) of the North Carolina Rules of Civil Procedure on a complaint alleging medical malpractice. Starla Fairfield and Lenny Fairfield ("Plaintiffs") appeal from the trial court's order dismissing this action based on their noncompliance with Rule 9(j). We affirm.

Factual and Procedural Background

We have summarized the pertinent facts below using Plaintiffs' own statements from their complaint, which we treat as true in reviewing a trial court's order granting a motion to dismiss. *See, e.g., Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006) ("When reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true.").

On 10 May 2014, Starla Fairfield was admitted to WakeMed Health & Hospitals ("WakeMed") in connection with an accidental overdose of acetaminophen. During her treatment, she was given a dose of Mucomyst that was approximately five times greater than the recommended dose. Medical personnel at WakeMed contacted Carolinas Poison Center, and emergency dialysis was ultimately performed on Mrs. Fairfield. Mrs. Fairfield and her husband were informed by medical staff at WakeMed that the staff was "only aware of two other cases of Mucomyst overdose, both resulting in death and severe brain damage, and therefore, that Mrs. Fairfield would also most likely die."

Mrs. Fairfield was subsequently released from WakeMed. As a result of this incident, she continues to experience physical and emotional pain and suffering.

On 13 April 2017, Mrs. Fairfield and her husband filed a complaint in Wake County Superior Court naming as defendants WakeMed; Marsha M. Smith, M.D.; Benjamin German, M.D.; Chudaratna Bhargava, M.D.; and John and Jane Doe Medical Staff.¹ In their complaint, Plaintiffs alleged claims for medical malpractice, negligent infliction of emotional distress, and loss of consortium. All of these claims were alleged to have arisen out of defendants' medical negligence in treating Mrs. Fairfield.

1. Plaintiffs subsequently took a voluntary dismissal of their claims against Dr. Bhargava, Dr. German, and John and Jane Doe Medical Staff. Therefore, WakeMed and Dr. Smith are the only remaining defendants.

FAIRFIELD v. WAKEMED

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The Complaint contained the following provision:

RULE 9(j) CERTIFICATION

Counsel for the Plaintiffs hereby certify and affirm, that prior to the filing [sic] this lawsuit, pursuant to Rule 9 (j) of the North Carolina Rules of Civil Procedure, that *certain* medical records and the medical care received by Mrs. Fairfield has been reviewed by a physician who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical standard of care provided by Defendants did not comply with the applicable standard of care.

(Emphasis added.)

All of the Defendants filed timely answers and motions to dismiss pursuant to Rule 12(b)(6). On 9 November 2017, a hearing on Defendants' motions was held before the Honorable W.O. Smith, III, in Wake County Superior Court. On 16 November 2017, the trial court entered an order dismissing this action based on its determination that Plaintiffs had failed to comply with Rule 9(j). Plaintiffs filed a timely notice of appeal.

Analysis**I. Rule 9(j)**

[1] In this appeal, Plaintiffs contend that the trial court erred in determining that their complaint was not in compliance with Rule 9(j).

The standard of review of an order granting a Rule 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On appeal, we review the pleadings *de novo* to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Feltman v. City of Wilson, 238 N.C. App. 246, 251, 767 S.E.2d 615, 619 (2014).

“Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses

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some fact that necessarily defeats the plaintiff's claim." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663 (2013) (citation omitted).

A plaintiff's pleading in a medical malpractice action, however, "must meet a higher standard than generally required to survive a motion to dismiss . . . [T]he requirements of Rule 9(j) must be met in the complaint in order to survive a motion to dismiss." *Alston v. Hueske*, 244 N.C. App. 546, 551-52, 781 S.E.2d 305, 309 (2016). Rule 9(j) states, in pertinent part, as follows:

(j) *Medical malpractice*. — Any complaint alleging medical malpractice by a health care provider . . . shall be dismissed unless:

(1) The pleading specifically asserts that the medical care and *all* medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C. R. Civ. P. 9(j) (emphasis added).

Our Supreme Court has explained that Rule 9(j) was intended to serve "as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review *before* filing of the action." *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012). Our courts have strictly enforced Rule 9(j)'s "clear and unambiguous" language as requiring dismissal of a medical malpractice action when the plaintiff's pleading is not in compliance with the Rule's requirements. *Thigpen v. Ngo*, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002) (citation and quotation marks omitted). *See id.* ("[M]edical malpractice complaints have a distinct requirement of expert certification with which the plaintiffs must comply. Such complaints will receive strict consideration by the trial judge. Failure to include the certification leads to dismissal.").

Here, the Rule 9(j) certification in Plaintiffs' complaint merely asserted that "certain" of Mrs. Fairfield's medical records had been reviewed by a physician who was expected to provide expert testimony that Defendants' treatment of her fell below the applicable standard of medical care. However, as quoted above, the plain language of Rule 9(j) requires that a plaintiff's pleading in a medical malpractice action

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contain an explicit certification that “all” medical records pertaining to the allegedly negligent acts have been reviewed.

We find instructive our Court’s decision in *Alston* in which we similarly addressed a litigant’s failure to strictly comply with the requirements of Rule 9(j). In *Alston*, the plaintiff brought a medical malpractice action arising from the death of the decedent during a surgical procedure. *Alston*, 244 N.C. App. at 547-48, 781 S.E.2d at 307. In an attempt to comply with Rule 9(j), the complaint alleged the following:

29. Prior to commencing this action, the medical records were reviewed and evaluated by a duly Board Certified [sic] who opined that the care rendered to Decedent was below the applicable standard of care.

30. . . . The medical care referred to in this complaint has been reviewed by person[s] who are reasonably expected to qualify as expert witnesses, or whom the plaintiff will seek to have qualified as expert witnesses under Rule 702 of the Rules of Evidence, and who is willing to testify that the medical care rendered plaintiff by the defendant(s) did not comply with the applicable standard of care.

Id. at 548, 781 S.E.2d at 307.

The trial court granted the defendants’ motion to dismiss on the ground that the Rule 9(j) certification was defective. We affirmed the court’s order and stated the following in explaining our ruling:

The wording of the complaint renders compliance with 9(j) problematic. A plaintiff can avoid this result by using the statutory language. Rule 9(j) requires “the medical care and all medical records” be reviewed by a person reasonably expected to qualify as an expert witness and who is willing to testify the applicable standard of care was not met. According to the complaint, the medical care was reviewed by someone reasonably expected to qualify as an expert witness who is willing to testify that defendants did not comply with the applicable standard of care. However, the complaint alleges medical records were reviewed by a “Board Certified” that said the care was below the applicable standard of care. Thus, the complaint does not properly allege the medical records were reviewed by a person *reasonably* expected to qualify as an expert witness.

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This omission in the complaint unnecessarily raises questions about . . . the witness being “reasonably expected” to qualify as an expert under Rule 702. The only information we have is that the witness is “Board Certified.” We do not know whether the witness is a certified doctor or nurse, or even another health care professional. We also cannot say whether the “Board Certified” person is of the same or similar specialty as would be required to testify [that] Hueske violated a standard of care. Simply put, we do not have enough information to evaluate whether this witness could reasonably be expected to qualify as an expert in this case.

The legislature passed Rule 9(j) to require a more stringent procedure to file a medical malpractice claim. Although pleadings are generally construed liberally, legislative intent as well as the strict interpretation given to Rule 9(j) by the North Carolina Supreme Court require us to find the wording of this complaint insufficient to meet the high standard of Rule 9(j).

Id. at 552-53, 781 S.E.2d at 310.

Thus, *Alston* demonstrates the degree to which North Carolina courts have strictly enforced the provisions of Rule 9(j). Although the specific reason that Plaintiffs’ complaint fails to fully comply with Rule 9(j) in the present case is distinct from that existing in *Alston*, we are nevertheless compelled to reach the same result. Here, Plaintiffs’ use of the word “certain” instead of “all” in their complaint with regard to those medical records actually reviewed by their proposed expert witness constitutes a failure to adhere to Rule 9(j)’s specific requirements. Based on the unambiguous language of the Rule, all of the relevant medical records reasonably available to a plaintiff in a medical malpractice action must be reviewed by the plaintiff’s anticipated expert witness prior to the filing of the lawsuit, and a certification of compliance with this requirement must be explicitly set out in the complaint.

Allowing a plaintiff’s expert witness to selectively review a mere portion of the relevant medical records would run afoul of the General Assembly’s clearly expressed mandate that the records be reviewed in their totality. Rule 9(j) simply does not permit a case-by-case approach that is dependent on the discretion of the plaintiff’s attorney or her proposed expert witness as to which of the available records falling within the ambit of the Rule are most relevant. Instead, Rule 9(j) requires a

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certification that *all* “medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry” have been reviewed before suit was filed. *See* N.C. R. Civ. P. 9(j).

The certification here simply did not conform to this requirement. Therefore, the trial court properly ruled that Plaintiffs had failed to comply with Rule 9(j). *See Fintchre v. Duke Univ.*, 241 N.C. App. 232, 242, 773 S.E.2d 318, 325 (2015) (affirming trial court’s dismissal of medical malpractice complaint for noncompliance with Rule 9(j)).

II. Due Process

[2] Plaintiffs also contend that the application of Rule 9(j) in this case violates their due process rights. As an initial matter, however, Plaintiffs do not cite any legal authority in support of this argument as required by the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 28(b)(6) (“The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies.”). Therefore, we deem this issue to be abandoned.

Plaintiffs’ constitutional argument fails substantively as well. Rather than providing an actual explanation as to how Rule 9(j) violates their due process rights, they instead candidly concede that “the argument that the Plaintiff[s] now make is one asking and recommending of [sic] this Court that the law (i.e., language of Rule 9(j)) requires changing in order to do equity and justice.”

It is axiomatic that such a request for us to rewrite a statute is antithetical to the proper role of a court in our system of government. As our Supreme Court stated more than fifty years ago:

When a court, in effect, constitutes itself a superlegislative body, and attempts to rewrite the law according to its predilections and notions of enlightened legislation, it destroys the separation of powers and thereby upsets the delicate system of checks and balances which has heretofore formed the keystone of our constitutional government.

State v. Cobb, 262 N.C. 262, 266, 136 S.E. 674, 677 (1964).

We are not unmindful of the harsh outcomes that can result from the application of Rule 9(j). However, based on the clear language employed by the General Assembly and the prior caselaw from our appellate courts that we are bound to follow, we must interpret Rule 9(j) as it is written.

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Any modification of the pleading requirements contained therein must come from the legislative branch rather than the judicial branch. *See In re J.M.D.*, 210 N.C. App. 420, 427, 708 S.E.2d 167, 172 (2011) (“[N]either we nor the trial court can re-write the statute which the General Assembly has given us.”).

Conclusion

For the reasons stated above, we affirm the trial court’s 16 November 2017 order.

AFFIRMED.

Judges ELMORE and DILLON concur.

AMY S. GRISSOM, PLAINTIFF

v.

DAVID I. COHEN, DEFENDANT

No. COA18-66

Filed 2 October 2018

1. Contempt—civil—show cause order—burden of proof

In a contentious custody and visitation case in which a mother sought to hold a father in civil contempt because their teenage daughter was not returned to her physical custody, the trial court’s order finding the father not to be in contempt did not contain a misapprehension that the mother carried the burden of proof. Although the order included a conclusion of law confusingly referring to the mother as not having met “her burden,” the hearing transcript demonstrated the trial court’s understanding of the differences between civil and criminal contempt and the differences in the burden of proof between a motion for contempt and a show cause order.

2. Child Visitation—civil contempt—custody order interpretation—implied forced visitation

In a contentious custody and visitation case in which a mother sought to hold a father in civil contempt because their teenage daughter was not returned to her physical custody, the Court of Appeals rejected the mother’s argument that the trial court should have found the father in contempt for failing to force the daughter to adhere to the custody order’s visitation schedule. Precedent did not

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establish a “forced visitation” rule, implied or otherwise. The trial court properly considered the best interests of the teenage daughter, who suffered from depression and self-harm and who expressed her preference not to visit with her mother, and the circumstances at the time of the hearing, before determining that the father was not in willful contempt.

3. Child Visitation—civil contempt—visitation provisions—willfulness

In a contentious custody and visitation case in which a mother sought to hold a father in civil contempt because their teenage daughter was not returned to her physical custody, the trial court did not misapprehend the law regarding custody and visitation when it found the father was not in willful contempt for failure to force his daughter to visit or return to her mother. The only way a trial court can enter a “forced visitation” order is under compelling circumstances, after giving the parties notice and an opportunity to be heard, and entering an order with findings and conclusions that take into account the best interests of the child; it would be a rare case in which physically forcing a child to visit or stay with a parent would be in that child’s best interests.

Appeal by plaintiff from order entered 9 October 2017 by Judge Matthew J. Osman in District Court, Mecklenburg County. Heard in the Court of Appeals 4 June 2018.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, and Jonathan D. Feit, for plaintiff-appellant.

Womble Bond Dickinson LLP, by H. Stephen Robinson; Kevin L. Miller; and Tom Bush, for defendant-appellee.

STROUD, Judge.

Plaintiff Amy S. Grissom (“Mother”) appeals from the trial court’s order holding that defendant David I. Cohen (“Father”) is not in civil contempt of a prior custody order based upon the refusal of the parties’ daughter, Mary,¹ to return to the physical custody of Mother. The trial court first entered an order denying Mother’s motion for contempt on 17 August 2016, but this order did not include findings of fact necessary to permit review by this Court, so we vacated that order and remanded

1. We use pseudonyms to protect the identity of the parties’ children.

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for the trial court to enter a new order including findings of fact to support its conclusion. We affirm.

I. Background

This appeal arises from an exceptionally contentious and prolonged custody battle between Mother and Father, beginning in January 2007 and continuing, with a few lulls, ever since. The parties are the parents of two children; the oldest, their son John, had just turned 18 before Mother filed her contempt motion, and the contempt motion and order in this appeal applies only to their daughter, Mary, now age 17. We will not recount the details of this battle leading up to the order on appeal, but in brief summary, the first custody order entered in 2009 granted sole legal and primary physical custody to Mother and secondary custodial time to Father.² Father's decision-making authority regarding the children was severely curtailed by this order based upon Father's misdeeds as described in the order. There were some relatively minor legal skirmishes after the 2009 order, with no major changes to the custodial arrangement until 9 March 2015, when the trial court entered an order modifying the 2009 custody order ("2015 Modified Custody Order"). Generally, the 2015 Modified Custody Order found that Father's behavior and relationship with the children had improved and the children wanted to spend more time with him. The 2015 Modified Custody Order allowed Father to have greater visitation time with the two children.

On 10 June 2016, Mother filed a motion she calls an "Omnibus Motion," comprising a motion for civil and criminal contempt, a motion for a temporary restraining order ("TRO") and preliminary injunction, and a motion for "judicial assistance." The Omnibus Motion is single-spaced and 17 pages long. Five and a half pages summarize the procedural history, including quotes from portions of prior orders, with particular emphasis on any findings unflattering to Father. The substantive portion of the Omnibus Motion begins at the bottom of page 5 and is entitled "Withholding of Plaintiff/Mother's Physical Custodial Time and Alienation." Mother then makes four pages of allegations, some "upon information and belief," of Father's actions and statements she alleges are part of his "campaign to alienate the children from Plaintiff/Mother," which has "intensified after the Court's most recent Custody Order and

2. Mother's counsel described the history in his closing argument, stating that he first wanted to "remind the Court . . . that [Father] has created nine years of litigation, has filed three motions to modify custody, has participated in two three-week custody trials, has involved the children with subpoenas, affidavits, live testimony last time and this time. There have been four judges, 636 findings of fact in two custody orders." And now, we can add two appeals to this tally.

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has resulted in the children being severely alienated from Plaintiff/Mother.”³ She stresses her belief that Father has encouraged the children not to return to her and that he has not “caused the children to face any consequences for their failure” to return to her home. She alleged that in January 2016, she received an email from John, which was copied to Father; Dr. Shulstad, the children’s pediatrician; Samantha Bosco, the guidance counselor at Mary’s high school, and Janani Buford, the guidance counselor at Mary’s middle school. John said Mary had confided to him a few days before that she was self-harming by cutting herself, and she had been doing this for about a year. He believed that she “needed serious help” and needed “to be in as positive of an environment as possible.” John also stated:

After almost ten years of moving back and forth constantly, and my 18th birthday coming quickly, I feel that I am mature and reasonable enough to make my own decisions. I have spoken with [Mary] and I feel that it is best if we spent time solely with Dad. [Mary] and I both love you very much. I would still like to see you and sustain a good relationship with you, but this current situation is just too difficult for me and [Mary] to cope with. I hope that you will understand and respect our decision just as we have understood and respected yours for almost a decade.

John claimed Mary asked Mother if she could see a therapist but her Mother ignored her; Mother denied that Mary ever requested to see a therapist. At the time of this email, the children had been with Father since 28 December 2015 for holiday visitation and they did not return to Mother’s home afterwards except for some brief visits; they did not stay overnight. Mother alleged this email was another example of Father’s campaign to destroy her relationship with the children. She alleged that Father was encouraging the children not to return to Mother’s home and that he gave them no consequences for their refusal. She alleged that despite the children’s refusal to return to her home, he “rewards” Mary by continuing to allow her to have sleepovers with friends, buy clothing, keep her phone, and take vacations. She alleged that the children were “hostile” and “cruel” to her, just as Father has been.

3. John had attained the age of 18 years old two months before Mother filed the Omnibus Motion, but he was still a minor as of January 2016 and at the time of most of the events described in the motion. Thus, when we refer to the “children,” we are referring to both John and Mary, but we realize that John was an adult when the Omnibus Motion was filed and he was no longer subject to the 2015 Modified Custody Order at that time.

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The next section of the motion is entitled “Refusal to Support [Mary’s] Attendance in Therapy, Failure to Apprise Plaintiff/Mother of [Mary’s] Condition, And Attempt to Obtain [Mary’s] Therapeutic Records.” Mother describes her efforts to find a therapist for Mary after receiving the email from John and Mary’s opposition to seeing the therapist she selected, alleging that Mary’s reluctance was caused by Father’s “influencing [Mary] to further his own goals.” Mary did ultimately see the therapist Mother selected, Ms. Reed, although she “continues to be reluctant.” She alleged that on 2 February 2016, Mary “refused to leave school to attend an appointment with Ms. Reed,” and Mother took her to see Dr. Shulstad, who discovered eight or nine “fresh cuts on [Mary’s] leg.” She notes this cutting occurred while Mary was with Father. Dr. Shulstad encouraged Mary to see Ms. Reed, and although she refused at times, she attended some appointments “when forced to do so by Dr. Shulstad or when she wants something (such as medical authorization to attend a summer camp).”

The next section of the motion is entitled “Interfering with Educational Decisions” and includes about a page of allegations of the parties’ disputes regarding Father taking Mary to tour boarding schools during the previous summer. The following section is entitled “Motion for Contempt.” It has five paragraphs, alleging his willful violation of the order and requesting that Father be held in civil and criminal contempt.

The next section of the motion is entitled, “Motion for Temporary Restraining Order and Preliminary Injunction.” Mother requested that the court enter a Temporary Restraining Order and Preliminary Injunction enjoining Father “from interfering with” Mother’s custodial rights and “authority to made medical and mental health decisions” for Mary; from taking Mary to “tour any additional schools” or talking to her or assisting her in any way regarding her application or attendance at any school; and from showing “these Motions and any subsequent Orders to the parties’ children” or talking about them. She also asked that Father be required to “return [Mary] to” her physical custody and “to support [Mary’s] attendance at reunification therapy and counseling with the therapist” of Mother’s choice.

The last section of the motion is entitled “Motion for Judicial Assistance” and Mother moved for the court to “facilitate intensive reunification therapy.”

The prayer for relief is two pages long. In pertinent part, Mother requested issuance of a show cause order directing that a hearing be held and that Father “show cause as to why he should not be held in

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contempt of the March 2015 Custody Order.” She also requested that the court

3. Find Defendant/Father in civil contempt of court and punish him as set forth in N.C.G.S. § 5A-21 et seq. until he can demonstrate a willingness to comply with the Court’s March 2015 Custody Order.
4. Find Defendant/Father in criminal contempt of court and punish him as set forth in N.C.G.S. § 5A-12 as a result of his willful failure to comply with the provisions of the March 2015 Custody Order.

Mother specifically asked for a list of “mechanisms” to enforce the Order and “as purging conditions” of contempt. This list includes several continuing actions, including that he “exert his parental authority and control”: to ensure that [Mary] returns to” her custody and stays there; to ensure that Mary attends counseling, to ensure that Mary attends reunification therapy; and to ensure that Mary communicates with Mother while in Father’s care. Mother also asked that Father be required to permit Mother to “make up the custodial parenting time missed since January 4, 2016.”

On 13 June 2016, Mother filed and served Father with a Notice of Hearing for 28 June 2016 on “Plaintiff/Mother’s Motion for Contempt filed June 10, 2016.” On 14 June 2016, the trial court entered an Order to Show Cause requiring Father to appear and show cause why he should not be held in civil or criminal contempt. Father requested continuance of the hearing to allow more time to prepare, but his motion was denied, and the trial court held a hearing on the contempt motion and order to show cause on 28 June 2016.

As this Court noted in the prior appeal, “At the 28 June 2016 show cause hearing, the trial court did not allow Mother to proceed on *both* civil *and* criminal contempt, requiring Mother to choose to pursue either civil *or* criminal contempt. Accordingly, Mother chose to proceed on her civil contempt motion against Father.” *Grissom v. Cohen*, __ N.C. App. __, 803 S.E.2d 697, at *2 (2017) (unpublished) (“*Grissom I*”). The trial court entered its first order finding Father not to be in civil contempt which was reversed by the first appeal and remanded for findings of fact:

The trial court’s order, though, is devoid of any specific factual findings regarding Father’s actions concerning the issue of Father’s willfulness. In order for us to conduct any meaningful review of the trial court’s determination

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regarding Father's willfulness, we must know what facts the trial court found to make that ultimate finding. Therefore, we remand the matter and direct the trial court to enter specific factual findings regarding whether Father's actions were willful. For instance, if the trial court enters findings that Father did not force or encourage his children to stay with him during Mother's time with the children, such findings would support the trial court's ultimate finding that Father did not act willfully, and the trial court would not be required to hear any additional evidence on the matter.

Grissom I, __ N.C. App. __, 803 S.E.2d 697, at *5 (citation omitted).

On 9 October 2017, the trial court entered a new order ("Order on Remand") with detailed findings of fact and conclusions of law⁴ without receiving additional evidence. Mother timely appealed.

II. Analysis

Mother argues the trial court "erred by failing to hold Father in civil contempt for effectively eliminating Mother's primary custody of their daughter." She claims to challenge 22 of the 37 findings of fact in the order and 7 of the legal conclusions. Although she argues she is challenging the findings of fact, she does not argue that the findings are not supported by the evidence. Instead, she contends the trial court's findings are in error because it (1) "misallocated the burden of proof;" (2) "Misapprehended the express and implied requirements of the Modified Custody Order," specifically arguing that the order is a "forced visitation" order;" and (3) erred by determining that "Father committed no *willful* violation of the modified custody order" based upon the trial court's misunderstanding of "willfulness" in this context. She makes the bold and legally impossible request that *this* Court make the factual determination that "Father willfully violated the Modified Custody Order" and to "remand . . . for a new fact-finder to consider additional evidence regarding whether Father remains in civil contempt." We cannot do this, since it is the trial court, not our Court, which is "entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, [and] find the facts[.]" *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 620 (2015). Mother requests in the alternative that we "remand for a new fact-finder to conduct a new contempt hearing with detailed instructions

4. The trial court has entered orders addressing the other motions in the Omnibus Motion and those orders are not the subject of this appeal.

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indicating that [*Hancock v. Hancock*, 122 N.C. App. 518, 471 S.E.2d 415 (1996)] and its progeny do not control.”⁵

This Court does not conduct wholesale *de novo* review of contempt orders, as Mother seems to request. Instead, “[t]he standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law.” *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997). “However, findings of fact to which no error is assigned are presumed to be supported by competent evidence and are binding on appeal. The trial court’s conclusions of law drawn from the findings of fact are reviewable *de novo*.” *Tucker v. Tucker*, 197 N.C. App. 592, 594, 679 S.E.2d 141, 142-43 (2009) (citations, quotation marks, and brackets omitted). Since Mother has challenged none of the findings of fact as unsupported by the evidence, but argues only that the trial court “misapprehended” the law, we will review *de novo* the trial court’s “apprehension of the law” to determine if the trial court considered the issues under the correct legal standards. *See generally id.* If the trial court considered the issues based upon the correct law, we will review the legal conclusions to determine if they are supported by the findings of fact. *Id.*

The trial court may find a party in civil contempt for failure to follow a court order under N.C. Gen. Stat. § 5A-21, which provides :

- (a) Failure to comply with an order of a court is a continuing civil contempt as long as:
 - (1) The order remains in force;
 - (2) The purpose of the order may still be served by compliance with the order;
 - (2a) The noncompliance by the person to whom the order is directed is willful; and
 - (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2017).

5. Mother has not suggested any impropriety by the trial court and we cannot discern any conceivable legal basis for her request for a “new fact-finder.” Mother asks for remand and she asks not only for another bite at the apple – she wants a new apple also.

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A. Burden of Proof

[1] Mother first argues the trial court improperly placed the burden of proof of civil contempt on her and not on Father. She notes correctly that “A show cause order in a *civil* contempt proceeding which is based on a sworn affidavit and a finding of probable cause by a judicial official *shifts the burden of proof* to the defendant to show why he should not be held in contempt.” *State v. Coleman*, 188 N.C. App. 144, 149-50, 655 S.E.2d 450, 453 (2008). The trial court entered the 14 June 2016 Show Cause Order based on Mother’s Omnibus Motion, so Father had the burden to show why he should not be held in contempt under the show cause order. *Id.* But Mother had also filed and served a separate notice of hearing on 13 June 2016 on the motion for contempt; on that motion and notice of hearing, the burden of proof was on her. *See* N.C. Gen. Stat. § 5A-23(a1) (“The burden of proof in a hearing pursuant to this subsection shall be on the aggrieved party.”).

Mother argues that the trial court improperly placed the burden on her based upon the following conclusion of law in Order on Remand: “5. As a matter of law, Mother failed to prove by a preponderance of the evidence that Father was in violation of the Modified Custody Order; nor has Mother met *her burden* of proving that Father is in civil contempt.” (Emphasis added). The Order on Remand also included several other conclusions of law that Father was not in willful contempt. Three were included in the section of the order entitled “Conclusions of Law:”

3. As a matter of law, Father has not willfully violated the Order with his actions such that he is in civil contempt, as alleged by Mother.

...

7. Father is not in civil contempt of Court.

8. Mother’s motion for Contempt should be denied.

At least two others were included within the Findings of Fact:

35. Father is not in civil contempt.

36. Mother’s motion for civil contempt should be denied.

Mother also argues that it would be “problematic to simply reverse based on the burden-misallocation and remand for an unguided reconsideration,” because of Mary’s “fast-approaching eighteenth birthday.” She therefore requests *this Court* to make new factual determinations based upon the allegations in her verified motion – which we cannot do, and would not do if we could – or that we remand for a complete do-over

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with a different judge. Even if there was any legal basis for a complete do-over – and there is not – remand for an entirely new trial would be unlikely to accomplish Mother’s purpose of having a new order before Mary turns 18. We appreciate her urgency to have the assistance of the courts in reestablishing her relationship with Mary, but we must review the order on appeal in compliance with the correct standards of review.⁶ *See generally Sharpe*, 127 N.C. App. at 709, 493 S.E.2d at 291; *Tucker*, 197 N.C. App. at 594, 679 S.E.2d at 142-43 (2009).

We agree the trial court’s various conclusions of law are confusing, and the trial court probably should not have used the words “her burden” in the order. Taken out of context, these words create Mother’s argument that the trial court “misapprehended” the law and placed the burden on her. *See Tigani v. Tigani*, __ N.C. App. __, __, 805 S.E.2d 546, 549-50 (2017) (“N.C. Gen. Stat. § 5A-23(a) (2015) provides that a proceeding for civil contempt may be initiated by the order of a judicial official directing the alleged contemnor to appear and show cause why he should not be held in civil contempt, or by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears and shows cause why he should not be held in contempt. Under either of these circumstances, the alleged contemnor has the burden of proof. In addition, pursuant to N.C. Gen. Stat. § 5A-23(a1), proceedings for civil contempt may be initiated by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt. The burden of proof in a hearing pursuant to this subsection shall be on the aggrieved party. When an aggrieved party rather than a judicial official initiates a proceeding for civil contempt, the burden of proof is on the aggrieved party, N.C. Gen. Stat. § 5A-23(a1) (2015), because there has not been a judicial finding of probable cause.” (Citations, quotation marks, brackets, and ellipses omitted)).

Father argues that the trial court’s confusing order is the result of Mother’s complex motions. In her Omnibus Motion she asked to proceed on *both* civil and criminal contempt simultaneously, and to proceed on *both* the motion for contempt (for which she would have the burden of proof) and the show cause order for contempt (for which Father would have the burden of proof). He contends that since this Court had already

6. The trial court agreed, and we agree that *everyone* should be complying with the existing 2015 Modified Custody order, but the reality is this: as of 27 May 2019, Mother and Mary will have to deal with their relationship on their own terms. We sincerely hope they will be successful, and sooner rather than later.

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remanded for a detailed order, the trial court was simply trying to cover all the bases. Father may be right that the trial court was simply trying to address both the contempt motion and the Show Cause Order with its multiple conclusions of law that Father was not in willful contempt.⁷ But upon reviewing the various motions, hearing transcript, this Court's prior opinion, and the entire order in context, we simply cannot agree that the trial court misallocated the burden of proof.

At the beginning of the hearing, the trial court and counsel discussed which portions of the Omnibus Motion were to be heard that day. Before any evidence was presented, the trial court asked Mother's counsel:

Judge: Well, you get to choose whether you want to proceed first or whether you want the burden to shift, right, on the motion to show cause?

[Mother's counsel]: I do want the burden to shift. My sole question is about time and some equal allocation of the time.

The trial court then asked counsel how many witnesses each anticipated calling to assist in allocation of the time for the hearing. Father's counsel said he would call four or five witnesses; Mother's counsel said she would call "zero to one" but noted that he would need adequate time for cross-examination and argument. The trial court then allocated time for the case, and Father presented his evidence *first*, because he had the burden of proof. During the testimony of the witnesses, there were many objections from counsel and the trial court tried to keep the questioning focused on the issue being heard since the issue was civil contempt, not criminal. At one point during cross-examination of Father by Mother's counsel, regarding the dispute over Father's taking Mary to visit boarding schools in 2015, the trial court noted this would be a past violation and not something for which Father may be held in civil contempt for as of that hearing in 2016. The trial court noted:

JUDGE OSMAN: I mean, as it relates to -- well, I mean, I don't know. I just did a CLE on this, I planned a CLE on this. I kind of feel like I know what I'm talking about. But sure, go ahead.

7. Despite its length, this opinion does not fully reflect the procedural or factual complexities of this case. After all, Mother calls her motion an "Omnibus Motion", and this name is accurate; Omnibus means, according to Black's Law Dictionary, "In all things; on all points." *In omnibus*, Black's Law Dictionary (10th Ed. 2014).

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At these points and others during the hearing, the trial court demonstrated that it understood the differences between civil and criminal contempt and understood the differences in the burden of proof between a motion for contempt and a show cause order. We are satisfied that the trial court understood that the burden of proof was on Father to show cause on why he should not be held in contempt and that the reference in the order to “her burden” was in response to Mother’s motion for contempt, as opposed to the show cause order.

Even if we remanded for the trial court to rephrase its order and remove the words at issue, ultimately, nothing would change. Father met his burden to show cause as to why he should not be held in contempt. He testified, and he presented compelling evidence including testimony from John, Mary, Dr. Shulstad, Ms. Buford, and various documentary exhibits. A remand would simply delay final resolution of the contempt motion and prolong litigation in this matter until after Mary turns 18.

Mother did not testify or present any testimony from any other witnesses, electing to rest on her verified motion alone.⁸ Over Father’s objection, the trial court agreed to accept her verified motion as equivalent to testimony presented at trial. We express no opinion on whether the trial court should have accepted the motion in this manner, but the mere fact that she filed a verified motion does not make her allegations irrefutable, any more than her live testimony would be irrefutable. The trial court has the discretion to determine the credibility and weight of all the evidence, whether it was a written document or live testimony, and this Court cannot re-weigh the evidence. *See, e.g., Clark v. Dyer*, 236 N.C. App. 9, 27-28, 762 S.E.2d 838, 848 (2014) (“[I]t is within a trial court’s discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial. We will not reweigh the evidence presented to the trial court[.]” (Citation and quotation marks omitted)). Father refuted the motion, and Mother had full opportunity to *respond* to his presentation of evidence, but chose not to do so and to rely only on her written motion. In other words, Father met *his burden* to produce evidence in response to the Show Cause Order to show why he should not be held in willful contempt with competent evidence which the trial court determined was credible. The burden then shifted back to Mother to refute his evidence, but she elected not to present any evidence. In that sense, she did not carry “her burden,”

8. The trial court demonstrated its understanding of the burden of proof at this point in the hearing as well. When the trial court asked if Mother would call any witnesses, her counsel stated, “I don’t have a witness.” The trial court responded, “Nor are you required to do so with a show cause.”

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either to show contempt under her motion for contempt or to respond to Father's evidence presented based upon the show cause order.

Mother also argues that the trial court's "misapprehension" of the burden of proof caused the findings of fact to be improper, since the court was considering the evidence under the wrong law. Even if the trial court had "misapprehended" the burden of proof, Mother has not explained how this "misapprehension" would have had any effect on the findings of fact. The findings are all supported by the evidence and most of the facts are not really in dispute. For example, Mother challenges this finding of fact:

16. [Mary] revealed to her brother that she had been self-harming for approximately one year and that she felt depressed and particularly so when at her Mother's home.

But Mother's own Omnibus Motion included detailed allegations of these same facts about Mary's revelation to John. There was no real dispute regarding most of the basic facts relevant to contempt, such as when Mary stopped going to her Mother's house, her stated reasons for stopping, or that she was depressed and self-harming. Mother's motion is based only on *why* Mary remained at her Father's home. She claims Mary stayed because of Father's continuing intense efforts to alienate Mary and his refusal to force her to return to Mother's home; Father claims Mary refused to go and he tried but was unable to make her go by any reasonable means short of physical force or punishment that may exacerbate her depression and self-harming. The trial court's findings resolved these factual issues, and based upon the evidence, we cannot discern how a "misapprehension" of the burden of proof would have made any meaningful difference in the findings of fact. This argument is without merit.

B. "Implied" Forced visitation provisions

[2] Mother next argues that the trial court "misapprehended the express and implied requirements of the modified custody order." She notes that the Order on Remand states that the 2015 Modified Custody Order has no "directive" requiring either party to "force visitation with the other parent." She challenges these findings of fact, which she notes are actually mixed findings of fact and conclusions of law:

26. It is very clear that both children do not want to see their Mother, and there is no directive in the Order imposing any duty on either parent to force visitation with the other parent.

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. . . .

33. Father is not in willful violation of the Modified Custody Order, and any noncompliance by Father, the person to whom the order is directed, is not willful. To the extent the visitation schedule is not being honored, the Court finds that this is the consequence of [Mary's] refusal to return and not due to any ongoing conduct by Father to thwart, prevent or inhibit [Mary's] return to Mother's residence.⁹

Mother contends that the 2015 Modified Custody Order does have "implied" forced visitation requirements. The 2015 Modified Custody Order is long and very detailed, but in summary, the order sets out detailed provisions on custodial times for each parent including holidays and school breaks and detailed provisions on decision-making. It also includes the provision that "[t]his order is enforceable by the contempt powers of the Court."

Mother relies heavily on *Reynolds v. Reynolds*, 109 N.C. App. 110, 426 S.E.2d 102 (1993), for her argument that the 2015 Modified Custody Order is a "forced visitation" order. *See id.* at 113, 426 S.E.2d at 104. Yet *Reynolds* was not a contempt case; it was a constitutional challenge to a visitation order. *Id.* at 112, 426 S.E.2d at 104. In *Reynolds*, the mother and father originally had an order of joint custody without a specified visitation schedule. *Id.* at 111, 426 S.E.2d at 103. The parties could not agree on visitation, so the father filed a motion for visitation. *Id.* The daughter, then age 11, "expressed a desire not to visit her father[.]" but the trial court determined it was in her best interest to visit with him and entered an order setting a visitation schedule. *Id.* at 113, 426 S.E.2d at 104. There is no indication in the opinion that the daughter had any serious emotional or behavioral problems – such as self-harming – but she simply did not want to visit her father. *See generally id.* The order in *Reynolds* included a provision "that '[v]iolation of this Order shall be punishable by Contempt.'" *Id.*, 426 S.E.2d at 105. Both the mother and the daughter challenged the order as a violation of their constitutional due process rights. *See generally id.* at 112, 426 S.E.2d at 104 ("The plaintiffs' sole contention on appeal is that the Order for visitation violates

9. Although she fortunately did not request this relief before the trial court, Mother implies quite strongly that the trial court could even hold *Mary* in contempt for not returning to her physical custody. She notes that "the court here incorrectly omitted Daughter as a person (1) to whom the Modified Custody Order is directed; and (2) over whom it possesses jurisdiction."

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the Constitutional rights of the minor plaintiff.”). This Court found “no merit to the arguments presented in the plaintiffs’ brief” and affirmed the order. *Id.*

Mother’s argument regarding “forced visitation” based on *Reynolds* relies upon this Court’s comparison of the *Reynolds* order to an order in *Mintz v. Mintz*, 64 N.C. App. 338, 307 S.E.2d 391 (1983). *See Reynolds*, 109 N.C. App. at 112-13, 426 S.E.2d at 104. As explained in *Reynolds*, the *Mintz* order

set out a specific visitation schedule which the minor son of the parties simply decided he did not want to follow. The plaintiff mother, who had primary custody of the child, did not insist that the child comply with the Order. *Unlike the Order in the present case, the Order in Mintz provided that, upon noncompliance with the Order, the father was to take the Order to the sheriff’s office and the sheriff was to immediately arrest the mother for contempt and place the son in the custody of the father.* This Court found that such a provision denied the mother due process of law, and therefore held the visitation Order to be invalid. This Court further concluded that, although the facts in *Mintz* failed to support a valid Order, an Order of “forced visitation” could be entered once the trial judge has (1) afforded the parties an opportunity for a hearing in accordance with due process, (2) created an Order setting out specific findings of fact and conclusions of law to justify and support the Order, and (3) made findings that include at a minimum that the drastic action of incarceration of a parent is reasonably necessary for the promotion and protection of the best interest and welfare of the child.

Reynolds, 109 N.C. App. at 113, 426 S.E.2d at 104 (citations omitted) (emphasis added).

The *Reynolds* Court concluded that the order did not violate the plaintiffs’ due process rights, since it was “not analogous to the contempt provision in the *Mintz* case as it does not provide that the violator will be incarcerated upon the oral report of a violation to the sheriff. Rather, the provision is a valid declaration that one who violates the Order will be subject to contempt proceedings in accordance with due process.” *Reynolds*, 109 N.C. App. at 113, 426 S.E.2d at 105. The holding of *Reynolds* is simply that custody or visitation provisions do not violate the constitutional due process rights of either the parents or the child

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because they are enforceable by contempt proceedings as long as the alleged condemner has proper notice and opportunity for hearing. *See generally id.* *Reynolds* does not establish any sort of “forced visitation” rule. *Id.*

Nor does the *Mintz* case create a “forced visitation” rule as Mother claims. *See generally* 64 N.C. App. 338, 307 S.E.2d 391. In fact, *Mintz* uses the word “forced” only once, in the first sentence, as a description of what happened in the case: “This case concerns a domestic confrontation between mother and father over forced visitation of their 11-year-old child with the father.” *Id.* at 338, 307 S.E.2d at 392.¹⁰ As noted in *Reynolds*, the *Mintz* order was defective because it allowed immediate incarceration of the alleged contemnor based on the word of the other parent, without opportunity for prior notice and hearing. *Reynolds*, 109 N.C. App. at 113, 426 S.E.2d at 104. *Mintz* does not address any sort of “implied” provisions of forced visitation. *See generally Mintz*, 64 N.C. App. 338, 307 S.E.2d 391.

Mother argues that because the 2015 Modified Custody Order has a provision that “[t]his order is enforceable by the contempt powers of the Court,” it is a “forced visitation” order. Father responds that this provision is unnecessary, since *all* custody and visitation orders are enforceable by the contempt powers of the court anyway. Many orders include this provision simply as a reminder to the parties of the potential consequences of violation, but its absence does not mean the order cannot be enforced by contempt under N.C. Gen. Stat. § 5A-11 (2017) (“Criminal contempt”) or N.C. Gen. Stat. § 5A-21 (“Civil contempt”). But Mother argues this provision creates a “forced visitation” order with “express and implied” requirements. Apparently, the “express” requirements are the custodial schedule, and the “implied” requirements are the actions a party must take to “force” visitation or custodial time in accord with the order. She argues that

to avoid contempt, Father must do exceedingly more than meet the *de minimis* threshold the court seemingly (and incorrectly) created here – that is, he cannot forestall a “willful noncompliance” determination merely by foregoing blatant force, manipulation, punishment, marginalization, persuasion, or mandates to thwart Daughter’s court-ordered “best interests” relationship with Mother.

10. *Mintz* does use the verb “force” three times, but these are as part of the facts and description of the issues. For example, the mother claimed “she felt she could not force David to go with his dad.” *Id.* at 338-39, 307 S.E.2d at 392 (quotation marks omitted).

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This awkward sentence seems to be based in part upon the trial court's finding No. 27:

27. The Court finds that Father did not create any situation to manipulate, or otherwise punish, or marginalize Mother's parenting time, nor did Father attempt to persuade or mandate in any fashion that [Mary] and [John] should not spend time with Mother as set forth in the Modified Custody Order."

But the trial court's finding was simply addressing Mother's own allegations in her Omnibus Motion that Father had intentionally done these very things in the past to alienate the children from her and was continuing to do them still. For example, her Omnibus Motion makes detailed allegations about times when Father had in the past "physically blocked" the children from seeing Mother; used his religion to divide the children from her; "used his 'money, power, and high energy to influence professionals to advance his agenda with respect to' " the children; "manipulated the professionals involved in the care of his children;" empowered the children to make Mother appear to be the "the bad guy," and many other similar allegations. The trial court found that Father had *not* committed this misbehavior as alleged by Mother's Omnibus Motion. This finding does not mean that the trial court misunderstood Father's obligation to take any reasonable measures possible to make Mary return to her Mother's home. Instead, the trial court found that "Father has taken reasonable measures to comply with the order as detailed in Findings of Fact 20, 21, and 22."¹¹ However, any noncompliance with the Modified Custody Order is, again, due to [Mary's] refusal to comply and not due to or caused by any noncompliance with the order by Father."

In every custody case, even contempt cases, the "polar star" is the best interest of the children; the *Mintz* case makes this point:

In all custody or visitation cases the child's best interest is the polar star. Here, the order fails to contain any findings

11. Those findings state that Father encouraged Mary to return; he drove Mary by her Mother's house and encouraged her to get out and visit Mother; he invited Mother to come to his home to talk to Mary. Although the trial court did not specifically find how many times these things happened, these are ultimate findings of fact. *See, e.g., In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) ("The trial court may not simply recite allegations, but must through processes of logical reasoning from the evidentiary facts find the ultimate facts essential to support the conclusions of law." (Citation and quotation marks omitted)). The trial court need not recite all of the evidence, but the evidence showed Father encouraged Mary to return and drove her to her Mother's home almost daily except during times when they were out of town.

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that the best interests and welfare of the child would be served by jailing the mother if the child refuses to visit with his father. This failing in the order also contributes to its invalidity.

Mintz, 64 N.C. App. at 340, 307 S.E.2d at 393 (citations omitted). The *Mintz* Court also notes that for older children, the trial court may give more weight to the wishes of the child:

If the child is of the age of discretion, the child's preference on visitation may be considered, but his choice is not absolute or controlling. As to what age is the age of discretion, we feel that the better statement of the law is that found in 42 Am. Jur. 2d *Infants* § 45 (1969): The nearer the child approaches the age of 14, the greater is the weight which should be given to the child's custodial preference. As to when the child is mature and intelligent enough to formulate a rational judgment concerning its welfare, it is generally agreed that in the absence of a statute to the contrary, no specific age is set by law in this regard, but the question depends on the mental capacity, or the mental development, or the intelligence of each child in question. It remains the duty of the trial judge to determine the weight to be accorded the child's preference, to find and conclude what is in the best interest of the child, and to decide what promotes the welfare of the child.

Id. at 340-41, 307 S.E.2d at 393-94 (citations omitted).

Mary was 15 years old at the time of the hearing, and the evidence showed that she is a very intelligent, mature, and capable young woman. The trial court heard Mary's testimony and testimony from her long-time pediatrician and her school guidance counselors. The trial court had the duty to consider the weight to give to her preference and to consider her best interests; the transcript and order show the trial court took this duty seriously. Although this is a contempt case and not a case establishing custody, the trial court was considering Mary's best interests as part of its evaluation of what Father should do to make Mary visit her Mother. There is no dispute that she was depressed and self-harming.¹²

12. Mother actually took the position at the hearing that Mary's self-harming was "irrelevant" to whether Father was in contempt. In a colloquy regarding one of the many objections during John's testimony, her counsel stated: "We'll stipulate there was cutting going on. I question what the relevance is of all of this in determining whether or not [Father] has wilfully violated the Court's order by not allowing [Mother] the right to exercise her custody time. There is no relevance."

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Dr. Shulstad testified that he had insisted that Mary go to therapy, and if she had not, he would have considered inpatient treatment for her protection.¹³ The evidence showed, and the trial court determined, that Mary's older brother, John, was the one whom she confided in and he sought help for her. And Mary and John then refused to return to their Mother's home. Mary testified that she was more depressed and anxious at her Mother's home and she did not feel she was ready to return. The trial court determined that Father did all that he could reasonably do to get Mary to visit her mother without resorting to actions that would likely be harmful to her. Mother cites to *Hancock v. Hancock*, 122 N.C. App. 518, 471 S.E.2d 415 (1996), and argues that Father "did not 'do everything possible short of using physical force or a threat of punishment' to ensure [Mary] was in Mother's custody." She notes that Father picked Mary up from school or soccer practice, "indulged" her by allowing her to keep her phone, see friends, go on trips out of town, buy new clothes, "enjoy an amusement park[,] and "mingle at various other social events." The trial court considered Mary's best interests and determined that Father did all that he could reasonably do without making Mary's situation worse. When announcing the ruling to the parties at the hearing, the trial court noted: "I cannot – and this might be one of the most compelling parts – I cannot find it is in the best interest of [Mary] to force visitation at this time, consistent with *Hancock*, based on what the testimony was from her."

Father was dealing with a depressed teenage girl who was self-harming. He picked her up from school because she told him she would walk home from school or practice instead of going with her mother, if he did not pick her up. Isolating her from friends or locking her in the house would likely exacerbate her condition. Mary was in therapy and improving, but therapy does not have instantaneous results. The trial court was well aware of the parties' "tumultuous history" and Father's past misdeeds – as are we, since Mother has listed them several times all the way back to 2006 in her Omnibus Motion and her brief – but the trial court properly considered Mary's best interests and the *current* circumstances in evaluating whether Father was in willful civil contempt.

C. Willfulness

[3] Mother next contends the trial court "misapprehended" the law regarding willful contempt by a parent in the context of a child's refusal

13. He testified, "When you are self cutting, [Mary] or any other self-cutter who refuses therapy, yes. Then the appropriate medical decision is that child is doing harm to themselves and at any point could go beyond self-cutting to self-mutilation to accidental death, that child needs to be admitted to the hospital."

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to visit with or see the other parent. She also argues extensively this Court should disapprove or limit *Hancock* and that the trial court erred by relying on *Hancock*.¹⁴ She claims that

the Modified Custody Order clearly contains the type of “forced-visitation” provision that *Mintz* contemplated and *Reynolds* recognized, *see* 109 N.C. App. at 113, 426 S.E.2d at 104-105, making *Reynolds* precedential and *Hancock* inapposite. *See Hancock*, 122 N.C. App. at 526, 471 S.E.2d at 420 (noting the underlying consent judgment and the contempt order lacked the type of forced-visitation provision contemplated in *Mintz*). The forced-visitation provision’s presence here thus vitiates challenged Findings of Fact 23-27, 29-30, 32-36, and Conclusions of Law 1-3 and 5-8, for they all assume its absence.

Mother argues that the 2015 Modified Custody Order has “implied forced visitation” provisions and Father willfully violated those “implied” provisions by not forcing Mary to go to her Mother’s home, but the trial court failed to recognize these “implied” requirements of the Order based upon its interpretation of *Hancock*, 122 N.C. App. 518, 471 S.E.2d 415. Specifically, Mother argues:

Here, the court interpreted *Hancock* and its progeny to rule otherwise, determining that Father could not be held in contempt—even though he never even attempted to use any incentive, reward, punishment, or other effective means of persuasion to ensure compliance—because the Modified Custody Order purportedly lacks an express forced-visitation provision.

Mother’s argument misconstrues *Hancock* and *Reynolds* and ignores the requirement that all orders dealing with child custody and visitation, even a contempt order, must consider the best interests of the child.

In *Hancock*, the parties’ son refused to go on three weekend visits with his father. *Hancock*, 122 N.C. App. at 521-22, 471 S.E.2d at 417. The trial court held the mother in civil contempt for willful failure to comply with the visitation order. *Id.* at 522, 471 S.E.2d at 417-18. On appeal, the mother argued that “there must be a showing that the custodial parent deliberately interfered with or frustrated the noncustodial parent’s visitation before the custodial parent’s actions can be considered willful.”

14. Mother filed a Motion for Initial *En Banc* review in this case, requesting this Court to overrule *Hancock* explicitly. The motion was denied.

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Id. at 522, 471 S.E.2d at 418. This Court agreed and reversed the order of civil contempt. *Id.* at 523, 471 S.E.2d at 418. The Court noted the testimony by mother, her daughter, and the child; all of the evidence showed that the mother had gotten the son ready for visitation, packed his things, told him he had to go, put him outside for his father to pick him up while she stayed inside, and told him to get into the car with his father. *Id.* at 523-24, 471 S.E.2d at 418-19. He refused. *Id.* at 524, 471 S.E.2d at 419. The son testified that “he loved his father and wished to spend time with him, but only if his father’s second wife and her children would not be there.” *Id.* He said he did not “feel comfortable” with his father’s wife or at his father’s home, that his step-mother “called him ‘a spoiled brat,’ ” and that the bed there was uncomfortable. *Id.* at 525, 471 S.E.2d at 419. There was evidence he “hated” his step-brother. *Id.*

This Court held there was no evidence that the mother had willfully disobeyed the court’s order and she was not in civil contempt:

Nowhere in the record do we find evidence that plaintiff acted purposefully and deliberately or with knowledge and stubborn resistance to prevent defendant’s visitation with the child. The evidence shows plaintiff prepared the child to go, encouraged him to visit with his father, and told him he had to go. The child simply refused. *Plaintiff did everything possible short of using physical force or a threat of punishment to make the child go with his father. While perhaps the plaintiff could have used some method to physically force the child to visit his father, even if she improperly did not force the visitation, her actions do not rise to a willful contempt of the consent judgment.*

Id. at 525, 471 S.E.2d at 419 (emphasis added).

The *Hancock* Court further noted that the father may have a remedy by asking the trial court for an order of “forced visitation,” but civil contempt was not the proper remedy:

Where, as here, the custodial parent does not prevent visitation but takes no action to force visitation when the child refuses to go, the proper method is for the non-custodial parent to ask the court to modify the order to compel visitation. A trial judge has the power to make an order forcing a child to visit the noncustodial parent. In this case, the trial court attempted the functional equivalent of an order of forced visitation by sentencing plaintiff to jail but allowing her to purge herself of contempt by

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delivering the child over to defendant each and every time he was entitled to visitation. However, the order fails as an attempt at forced visitation.

Id. at 526, 471 S.E.2d at 420 (citations, quotation marks, and brackets omitted). The *Hancock* Court noted that a trial judge could enter an “order of forced visitation” but only if

the circumstances are so compelling and only after he has done the following: afforded to the parties a hearing in accordance with due process; created a proper court order based on findings of fact and conclusions of law determined by the judge to justify and support the order; and made findings that include at a minimum that the drastic action of incarceration of a parent is reasonably necessary for the promotion and protection of the best interest and welfare of the child. Neither the consent judgment nor the contempt order contains any findings that the incarceration of the plaintiff is reasonably necessary to promote and protect the best interests of the child.

Id. (citation and quotation marks omitted).

Here, Mother included in her Omnibus Motion two motions which are essentially motions for a forced visitation order. She asked for a mandatory preliminary injunction requiring Father to return Mary to her home and to “exert his parental influence” to make her stay there. She also asked for “judicial assistance” in the form of mandated reunification therapy. If these motions are not requests for “forced visitation” orders, it is hard to imagine what a forced visitation request would include. Those motions are not subjects of the order on appeal. But even in a contempt order, if the trial court is to enter a contempt order that operates as an order of “forced visitation,” the order may be entered only under “compelling” circumstances and

only after he has done the following: afforded to the parties a hearing in accordance with due process; created a proper court order based on findings of fact and conclusions of law determined by the judge to justify and support the order; and made findings that include at a minimum that the drastic action of incarceration of a parent is reasonably necessary for the promotion and protection of the best interest and welfare of the child.

Id. (quoting *Mintz*, 64 N.C. App. at 341, 307 S.E.2d at 394). And this is exactly what the trial court noted it could *not* do: “this might be one of

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the most compelling parts -- I cannot find that it is in the best interest of [Mary] to force visitation at this time."

Mother seeks to distinguish *Hancock* based upon the differences in the facts: the duration of the missed custodial time; the custodial status (denial of weekend visitation v. physical custody); Father's "indulgence" of Mary when at his home; and the tumultuous history of this case. We agree that no two custody cases are alike factually; "Happy families are all alike; every unhappy family is unhappy in its own way."¹⁵ The trial court's job is to hear the evidence, find the facts, consider those facts and circumstances, and determine what action the parent should reasonably take to force visitation, consistent with the best interests of the child. *See generally Hancock*, 122 N.C. App. at 526, 471 S.E.2d at 420. The differences in the facts of the cases do not eliminate *Hancock* as a precedent supporting the trial court's order, nor is it the only case which supports the order. *See also McKinney v. McKinney*, __ N.C. App. __, __, 799 S.E.2d 280, 284-85 (2017) ("In the present case, the district court made no finding that Father refused to allow Max to live with Mother or refused to obey the custody orders. The district court did not find that Father encouraged Max to stay with him, but rather, found that he told Max that Max should go home. It is true that the district court found that Father did not punish Max or make life uncomfortable for Max while remaining in Wilmington. And these actions and inactions may have been improper, but otherwise do not rise to the level of contempt. We do not think that the findings that Father provided a high standard of living for Max which was an 'enticement' for Max to prefer living with Father is enough to rise to the level of willfulness, absent a finding supported by the evidence that Father provided a high standard of living for the purpose of enticing Max to run away from Mother rather than merely for the purpose of providing for or bonding with Max." (citations omitted)).

The need to consider the child's best interest is why cases have typically not required a parent to use "physical force" or other extreme measures to make a child visit or stay with a parent. *See generally McKinney*, __ N.C. App. at __, 799 S.E.2d at 284-85; *Hancock*, 122 N.C. App. at 525-26, 471 S.E.2d at 419-20. A certain amount of physical force would make a child go in any case, regardless of the child's age or circumstances, but it would probably never be in a child's best interest.

Mother's predictions of anarchy in enforcement of custody orders based upon *Hancock* -- and the trial court's order -- from allowing a

15. Leo Tolstoy, *Anna Karenina* 3 (Melanie Hill & Kathryn Knight eds., Constance Garnett trans., 2005) (1875).

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parent to ignore a court order with impunity where a child simply refuses to go are unfounded. She argues:

Granting an alleged contemnor absolution based [sic] *Hancock*, however, violates several fundamental legal principles and perpetuates bad public policy.

For instance, allowing a parent to sidestep contempt based on a child's actual or purported refusal to honor a custody order – i.e., the adjudication of what is in the child's best interest – effectively means that a child possesses actual or apparent authority to modify or otherwise override the ruling, *sua sponte*. This is wrong on several levels. This faulty position likewise seemingly implies that every court-ordered custody/visitation schedule automatically is subject to a child's approval, a condition previously allowed only by express provision under extreme circumstances.

Further, allowing a parent to raise a child's actual or purported "wishes" as a shield against contempt liability in such circumstances perversely places the child in jeopardy of being (1) held in contempt; and/or (2) adjudicated "delinquent" or "undisciplined". It similarly exposes the alleged contemnor- parent to possible criminal prosecution for aiding a "delinquent" or "undisciplined" juvenile.

(Citations omitted).

The order on appeal did not allow Father to ignore the court's order with impunity. And neither *Hancock* nor any other case grants alleged contemnors "absolution" based simply on a child's refusal or wishes, nor does it imply that any "court-ordered custody/visitation schedule" is subject to a child's approval. The problem with Mother's efforts to hold Father in civil contempt was not the provisions of the Order or *Hancock*; it was the unique facts of this case, including Mary's mental health concerns. This is not a case of a young child simply saying "no."

III. Conclusion

The trial court did not misapprehend the law of civil contempt, either on the burden of proof or willfulness. The trial court's conclusions of law are supported by the findings of fact. We therefore affirm the order.

AFFIRMED.

Chief Judge McGEE and Judge BRYANT concur.

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LISA SMITH HILL, PLAINTIFF

v.

GLENN ANTHONY HILL, DEFENDANT

No. COA17-576

Filed 2 October 2018

1. Child Custody and Support—modification of custody—loss of job—imputed income—motion pending for four years

A child support order was remanded where the dispute began when the father lost his job, he continued to pay the required support until he eventually unilaterally reduced the payments, he engaged in a lengthy job search, he eventually accepted a job at a reduced salary, and he got married and bought a new car and house. The original motion was pending for four years and the Court of Appeals could not determine whether the trial court imputed income to the father and the basis of the imputation for each time period. The matter was remanded for correction of the erroneous date of the father's settlement with his prior employer along with related appropriate corrections, and for the basis for any imputations of income.

2. Child Custody and Support—support—modification—loss of job—depletion of estate

The trial court was not authorized to base a child support modification solely upon depletion of the husband's estate in a case in which a child support order was entered, the husband lost his job and engaged in a long job search during which he paid the child support obligation from his assets until his assets ran low, the husband eventually accepted a job at a lower salary, and four years elapsed from the motion to the hearing. Although depletion of the husband's estate may be a proper basis to establish an alimony obligation, the same is not necessarily true for child support. The case was remanded for findings to clarify whether the trial court was actually imputing income and the basis for imputing income.

3. Divorce—alimony—calculation of amount

An award of alimony arrears was remanded for calculation of the correct amount owed.

4. Contempt—civil—failure to pay alimony and support—unilateral reduction

A trial court order holding a husband in contempt under N.C.G.S. § 5A-21(a) for failure to pay alimony and child support was

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remanded for a determination of arrearages and purge conditions where four years elapsed between the filing of a motion to modify and the hearing. In the interim, the husband lost his job, engaged in a long job search during which he paid the amounts owed from his assets, and eventually unilaterally reduced his payments. Although a supporting parent may file a motion to reduce his child support obligations, unilaterally reducing his payments entirely could subject him to contempt. Because of the time periods involved in this case, the reduction in alimony may not have been willful and it was possible that the husband was not in contempt for alimony if he was paying the new, reduced amount.

5. Contempt—civil—notice of noncompliance—argument waived

The husband in a child support and alimony matter waived any argument concerning notice of the acts for which he could be held in contempt when he actively participated in the trial without raising his objection.

6. Attorney Fees—alimony and child support action—modification

An award of attorney fees in a child support and alimony action was vacated where the matter extended over several years, the circumstances existing on the dates of the motions for modification differed greatly, and the trial court did not specify the basis for the award.

Appeal by defendant from order entered 12 May 2016 by Judge Melinda H. Crouch in District Court, New Hanover County. Heard in the Court of Appeals 11 January 2018.

Block, Crouch, Keeter, Behm & Sayed, LLP, by Christopher K. Behm and Linda B. Sayed, for plaintiff-appellee.

Jonathan McGirt, and Sandlin Family Law Group, by Deborah Sandlin, for defendant-appellant.

STROUD, Judge.

Defendant Glenn Anthony Hill (“Husband”) appeals from the trial court’s order modifying alimony and child support. Husband argues that the trial court erred by imputing income to him during his period of unemployment after an involuntary termination, based on bad faith, despite its findings he was diligently seeking a job with earnings similar to his prior jobs. Husband also argues that the trial court erred by holding

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him in contempt of court for failure to pay his support obligations during a portion of the four years prior to the hearing, since plaintiff Lisa Smith Hill's ("Wife")'s contempt motion did not give him notice of her claim on the entire time period, and because the trial court's order held him in contempt for violating orders which were not actually in force at the time of the contempt, given the trial court's simultaneous modification of the order effective back to the dates of filing of the motion to modify. In addition, he argues the trial court erred in its award of attorney fees of a lump sum, without differentiation between the amounts awarded for each of the three claims – modification of child support, alimony, and contempt – and without the required findings of fact required for every claim. For the reasons explained below, we affirm in part and reverse and remand in part the trial court's order on alimony and child support; conclude the trial court did not err in finding Husband in civil contempt for failure to pay based upon his arguments that the order was not still "in force" and that he did not have proper notice, but reverse and remand for any revisions needed to the purge conditions based upon arrearages owed; and reverse and remand the trial court's order on attorney fees.

Background

The parties were married in 1992 and have three children. They separated in October 2010 and were divorced in July 2012. On 15 March 2011, they entered into a consent order regarding child custody, child support, and post-separation support; Husband was required to pay child support of \$3,500.00 per month and postseparation support of \$4,500.00 per month and to maintain medical insurance on Wife and their children. When the consent order was entered, Wife was unemployed and Husband was working in China. The order did not make detailed findings regarding the parties' expenses or Husband's income, but Husband was employed with Company in China and earned \$543,000.00 in 2011.

The order which is the subject of this appeal addresses Husband's motions to modify the alimony and child support obligations set by the consent order entered in 2011¹ and other pending motions. On 15 January 2012, Husband was involuntarily terminated from Company. On 7 February 2012, Husband filed a motion to modify his child support obligation based upon his job loss. On 18 June 2012, he moved to

1. In some portions of this opinion, we will refer to both the alimony obligation and the child support obligation together as Husband's "support obligation" since the findings of fact generally apply to both obligations. We will differentiate between the two obligations in portions of the opinion where only one obligation is addressed.

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modify his postseparation support obligation. On 30 July 2012, the trial court held a hearing on Husband's motion to modify child support and Wife's alimony claim. Both Husband and Wife were unemployed at the time of this hearing.

On 31 August 2012, Wife began working with the New Hanover County Schools as a speech pathologist. On 12 September 2012, the trial court entered an order on alimony. Although Husband was unemployed, the trial court set permanent alimony at \$4,500.00 per month – the same as when he was earning over \$500,000.00 annually – based upon his estate of \$627,618.00. The order found that both parties would have to deplete their estates since neither was employed. Also, on 12 September 2012, the trial court entered an order denying modification of child custody and child support, finding no substantial change in circumstances to justify modification. On 19 September 2012, Husband filed another motion to modify both permanent alimony and child support, based in part upon Wife's having gotten a job between the time of the hearing on modification of child support and setting alimony and entry of the orders based upon that hearing. On 25 September 2012, Husband filed a Rule 59 motion alleging that the trial court erred by failing to include any findings regarding his involuntary reduction in income.

In May 2013, Husband filed a lawsuit in federal court against Company asserting claims arising out of his termination. On 31 July 2013, the trial court heard Husband's Rule 59 motion, and on 30 August 2013, the court entered an order that set aside the 12 September 2012 order denying modification of child support and ordered a new trial on child support. Husband's motion to modify child support filed on 7 February 2012 remained unresolved. On 6 December 2013, Company's motion to dismiss Husband's federal lawsuit was granted in part; subsequently, on 17 December 2013, Husband signed a settlement agreement with Company.

Nearly three years later, on 5 April 2016, the trial court heard all of the pending motions: both of Husband's motions for modification of his support obligations (the motion for modification of child support filed on 7 February 2012 and motion to modify alimony and child support filed 19 September 2012); Wife's response to Husband's motion to modify permanent alimony and motion to modify child support, including a motion to deviate from the child support guidelines; and Wife's motion for contempt for failure to pay child support and alimony filed on 31 July 2013. The trial court entered its order addressing the motions on 12 May 2016, and Husband timely filed notice of appeal to this Court.

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Analysis

As noted above, Husband raises three issues on appeal. We address each in turn.

I. Modification of Alimony and Child Support

Husband argues that the “trial court erred as a matter of law and abused its discretion in setting awards of alimony and child support based upon imputation of income and the trial court’s deliberate depletion of defendant’s estate.” (Original in all caps). This argument has four sections: (a) inadequacy of the findings of fact to support imputation of income; (b) failure to consider Husband’s actual income during several periods of time and retrospectively basing his obligations upon his current income; (c) improperly finding Husband’s ability to pay his obligations based upon depletion of his estate; and (d) a mathematical error in the calculation of alimony arrearages.

Most issues in this appeal are based upon the determination of Husband’s income and ability to pay child support and alimony when he was unemployed. Because his initial motion to modify was filed in February 2012, and the motions were not heard until over four years later, on 5 April 2016, the trial court’s order addressed the parties’ incomes and expenses during several distinct time periods. From February 2012 until 31 August 2012, both parties were unemployed. From 31 August 2012 until 29 June 2015, Wife was employed and Husband was not. On 29 June 2015, Husband began his new job with Ebara in Nevada, with an income of \$275,000.00 plus an annual performance incentive and various benefits. Based upon the date of the motions filed, the trial court considered the motion to modify child support from March 2012 to the date of hearing, and the motion to modify alimony from October 2012 to the date of hearing. Although we understand that our trial courts are overburdened and delays in hearings are sometimes inevitable, most of the issues and legal and mathematical complications in this case would have probably been avoided if Husband’s motions to modify his support obligations had not been delayed for approximately four years after filing.

A. Inadequacy of the findings of fact to support imputation of income

[1] The current dispute began after Husband was involuntarily terminated from his job in China on 15 January 2012. He was then unemployed and engaged in a job search until 29 June 2015. Since his only regular income was from his employment, he had no income during this time. The trial court found that Husband had no income from March

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2012 until December 2013. In 2014, Husband received \$351,937.52 gross funds from the settlement of his lawsuit against Company, and in one analysis of Husband's income, the trial court averaged this amount over the months of 2014, finding Husband's income as \$29,238.00 per month. From January to June 2015, the trial court found Husband again had no income. As of July 2015, when Husband began working for Ebara, until December 2015, the trial court used Husband's actual income, which averaged to \$27,250.00 per month. The trial court also did an alternative analysis of Husband's income, averaging Husband's total income received from 1 March 2012 until 31 December 2014, or 34 months; the total W-2 income was \$456,701.00, for an average monthly gross income of \$13,432.00.

Although Husband had no income during most of the four year period, the trial court's order did not reduce his child support obligation for that time period, but set child support at \$3,500.00 per month from March 2012 to 1 June 2015 and increased it to \$4,200.00 per month, plus 15% of any annual bonuses received as of 1 July 2015. Husband's alimony obligation was reduced from \$4,500.00 per month to \$3,500.00 per month, back to 1 October 2012, to be paid for ten years. The trial court also held Husband in willful contempt for his failure to pay child support and alimony from June 2013 through March 2016.

Husband argues that the trial court erred by failing to set his support obligations based upon his actual income from March 2012 until July 2015, because the findings do not support imputation of income. Wife argues that the trial court made sufficient findings to support imputation of income to Husband, and in the alternative, that the trial court actually did not impute income to Husband but instead considered his "income from all available sources" or averaged his "income over four years" and determined that depletion of his estate to pay his obligations would be proper.

Normally, both alimony and child support are set based upon the parties' actual incomes at the time of the order. *See generally Frey v. Best*, 189 N.C. App. 622, 627, 631, 659 S.E.2d 60, 66, 68 (2008).

Regarding alimony, this Court has explained that

Alimony is ordinarily determined by a party's actual income, from all sources, at the time of the order. To base an alimony obligation on earning capacity rather than actual income, the trial court must first find that the party has depressed [his or] her income in bad faith. In the context of alimony, bad faith means that the spouse is not living up to income potential in order to avoid or frustrate

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the support obligation. . . . The trial court might also find bad faith, or the intent to avoid reasonable support obligations, from evidence that a spouse has refused to seek or to accept gainful employment; willfully refused to secure or take a job; deliberately not applied himself or herself to a business or employment; or intentionally depressed income to an artificial low.

Works v. Works, 217 N.C. App. 345, 347, 719 S.E.2d 218, 219 (2011) (citations and quotation marks omitted).

On child support, both case law and the Child Support Guidelines address when income may be imputed:

The North Carolina Child Support Guidelines state:

If either parent is voluntarily unemployed or underemployed to the extent that the parent cannot provide a minimum level of support for himself or herself and his or her children when he or she is physically and mentally capable of doing so, and the court finds that the parent's voluntary unemployment or underemployment is the result of a parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual, income.

The primary issue is whether a party is motivated by a desire to avoid his reasonable support obligations. To apply the earnings capacity rule, the trial court must have sufficient evidence of the proscribed intent. The earnings capacity rule can be applied if the evidence presented shows that a party has disregarded its parental obligations by:

(1) failing to exercise his reasonable capacity to earn, (2) deliberately avoiding his family's financial responsibilities, (3) acting in deliberate disregard for his support obligations, (4) refusing to seek or to accept gainful employment, (5) willfully refusing to secure or take a job, (6) deliberately not applying himself to his business, (7) intentionally depressing his income to an artificial low, or (8) intentionally leaving his employment to go into another business.

The situations enumerated are specific types of bad faith that justify the trial court's use of imputed income or the earnings capacity rule.

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Lueallen v. Lueallen, __ N.C. App. __, __, 790 S.E.2d 690, 703-04 (2016) (citation, quotation marks, and ellipses omitted).

Moreover,

It is well established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified. . . .

It is clear, however, that before the earnings capacity rule is imposed, it must be shown that the party's actions which reduced his income were not taken in good faith. Thus, where the trial court finds that the decrease in a party's income is substantial and involuntary, without a showing of deliberate depression of income or other bad faith, the trial court is without power to impute income, and must determine the party's child support obligation based on the party's actual income.

Ellis v. Ellis, 126 N.C. App. 362, 364-65, 485 S.E.2d 82, 83 (1997) (citations, quotation marks, and brackets omitted).

Husband contends that the trial court erred by imputing income to him during various time periods covered by the order and requiring him to deplete his estate to pay alimony and child support as ordered during times when he was unemployed. He argues that the evidence and findings of fact do not show he acted in bad faith in his job search after his involuntary termination in January 2012. Husband also contends that the trial court had in prior orders "repeatedly endorsed [Husband's] efforts to seek a favorable recovery or settlement from his dispute with Company, and had also indicated in effect that [Husband's] pursuit of suitable executive-level re-employment would best meet the needs of the parties." He argues that in the order on appeal, "the trial court made an abrupt about-face, somersaulting over its previous approval of [Husband's] actions, and now harshly and unreasonably began blaming [Husband] for his 'bad faith' in 'purposely suppress[ing]' his income during his period of involuntary unemployment, as evidence of his 'willful disdain' for his support obligations."

Perhaps seeking to minimize the apparent inconsistency in the trial court's treatment of Husband's unemployment over the course of the case since 2012, Wife responds by arguing that the trial court did not impute income based upon Husband's deliberate suppression of his income but instead imputed income based upon findings that Husband was "indulging himself in excessive spending because of a disregard of his marital obligation to provide reasonable support for his wife and

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children.” In his reply brief, Husband addresses Wife’s argument and notes that the trial court’s findings do not establish that Husband had engaged in “excessive spending” but he had engaged in only “perfectly ordinary human behavior” such as getting married, buying a car, and buying a house.

Although the trial court was not entirely clear on its reasons for imputing income – or even *if* it actually imputed income – Wife is correct that the trial court made findings which may support imputation of income based upon its determination that Husband had acted in deliberate disregard for his support obligations as of June 2013, when he unilaterally reduced his support payments to \$300.00, in conjunction with his increases in spending which coincided with his new relationship with his girlfriend, now wife, although he was still unemployed. But if the trial court imputed income for this reason, the reason for imputation in 2012 remains in question. Although Husband was paying his support obligations then, there were pending motions to modify and Husband requested modification effective as of the date of his motion.

The order on appeal is 38 pages long and has 136 paragraphs of findings of fact, plus the 21 attached child support worksheets for calculations for various time periods over the course of the case. Most of the findings are not challenged as unsupported by the evidence. Despite the extensive detail in the order, we have had difficulty reviewing the calculation of alimony and the modification of child support because the order does not include findings of Husband’s expenses for any time period covered by the order, although there are findings as to Wife’s and the children’s expenses. In addition, as noted above, it is not clear if the trial court did actually impute income to Husband and if so, the basis for imputation during the various time periods.

Husband challenges Findings 52, 53, and 61 and these findings of fact are important in the trial court’s determination that Husband was willfully suppressing his income or acting in bad faith. Wife acknowledges that the date of settlement in the findings is incorrect, but argues these findings are unnecessary to support the trial court’s order:

52. *On December 6, 2012*, the federal judge in Richmond, Virginia, granted [Company’s] motion to dismiss part of his lawsuit, including his request for punitive damages, attorney’s fees and specific performance.

53. *Even after this devastating evisceration of his federal court action*, Defendant Glenn Anthony Hill did not settle the [Company] lawsuit for another year.

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54. After [Company] terminated Defendant Glenn Anthony Hill from employment in January 2012, Defendant Glenn Anthony Hill sent out hundreds of resumes, networked with others in his industry, and worked with headhunters to search for executive or engineering jobs for which he is suited. He had job interviews in London, Malaysia, several in China and a few places in the United States.

....

61. Defendant Glenn Anthony Hill's refusal to look for any work outside of executive or engineering positions for such an extended period of unemployment, *his refusal to settle the [Company] lawsuit for a year* after the adverse outcome in federal court, and his stubborn refusal to use his substantial estate to pay reasonable support shows a naïve indifference to fulfill support obligations and demonstrates a bad faith avoidance of his support obligations.

(Emphasis added).

Finding No. 52 incorrectly states the date of settlement of the lawsuit as 17 December 2012, but it was actually 17 December 2013. Thus, Husband settled the lawsuit with Company only *eleven days* after the “devastating evisceration of his federal court action” against Company, not over a year later. This is not a mere typographical error, as demonstrated by the trial court's Findings Nos. 53 and 61, which stress that his “refusal to settle” for a year after the adverse outcome shows his bad faith and “naïve indifference” to his support obligations. Settling only *eleven days* later would not show bad faith or “naïve indifference,” at least not based upon an unreasonably prolonged pursuit of the lawsuit against Company. In contrast, Finding No. 54, above, indicates that Husband was working hard to find a new job: he “sent out hundreds of resumes, networked with others in his industry, and worked with headhunters to search for executive or engineering jobs for which he is suited” and “had job interviews in London, Malaysia, several in China and a few places in the United States.” These findings and some others addressing Husband's efforts to find a new job seem inconsistent with the trial court's finding that Husband acted in bad faith. For example, the finding that Husband was diligently seeking a new “executive or engineering job for which he [was] suited” – apparently the entire time, since the finding does not indicate he ever stopped seeking a new job – seems to conflict with Finding No. 82:

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82. Despite submitting many applications for employment and his other efforts to secure a job in his field, considering his educational background and experience, his overall good health and age of 50 years, remaining unemployed continuously for 39 [sic, i.e., 42] months in a national economy on the upswing simply cannot be rationalized as a reasonable period of involuntary unemployment.

That fact that Husband's job search took a long time does not mean it was in bad faith. Husband argues no evidence was presented to the trial court regarding the "national economy" from 2012 through 2016, and in particular, no evidence regarding the state of the industry or job market in which Husband was seeking employment. Our record does not even clearly identify the industry in which he was seeking a job because of the confidentiality agreement regarding Company, and the transcript also includes little information on his job.

At the beginning of the trial, the parties addressed issues which may arise during trial regarding the confidentiality agreement and sealed records regarding Company and then made the following stipulation regarding Husband's job search:

And we can also put on the record a further stipulation that the plaintiff acknowledges that Mr. Hill applied for in excess of probably 100 jobs for executive type positions for various companies across the United States and across the world seeking employment from—after his termination in January of 2012 until he got a job in July—or June of 2015.²

Wife does not direct us to any evidence regarding the national economy, the job market, or the state of the industry in which Husband sought employment. Wife's response to Husband's argument is simply that "[Husband] purportedly futilely searched for an executive job for a period of nearly 3½ years." But Husband's search was not a "purported" search; it was a real search, at least according to Wife's stipulation and the trial court's Finding No. 54. Nor was his search "futile," although it may have been prolonged, since he did eventually find the executive-level job he was seeking. There is also no evidence that Husband was offered jobs but turned them down.

2. The only information we can find regarding Husband's area of expertise is his testimony that he had worked in "power generation" and in "import-export" and his background was in engineering.

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This case is quite different from *Lueallen*, where this Court addressed imputation of income based upon the trial court's determination that the mother's continued unemployment for three years after she had voluntarily quit her job as a teacher. See generally *Lueallen v. Lueallen*, __ N.C. App. __, 790 S.E.2d 690. In *Lueallen*, the mother argued that she had been persistently seeking a new job, but the trial court found she had actually failed to apply for jobs in Mecklenburg County, despite her allegation she was "currently actively seeking" jobs there in her verified motion to modify child support. *Id.* at __, 790 S.E.2d at 704. There was also "extensive testimony at trial regarding Mother's educational and professional qualifications and her work history." *Id.* at __, 790 S.E.2d at 704. Based upon her quitting her prior job without having another job lined up, her failure to seek a new job for three years, and her job qualifications and experience, this Court affirmed the imputation of income. *Id.* at __, 790 S.E.2d at 704-05.

An unsuccessful or prolonged job search after an involuntary job loss is not necessarily evidence of a bad faith suppression of income. For example, in *Ludlam v. Miller*, 225 N.C. App. 350, 739 S.E.2d 555 (2013), both the husband and wife lost their jobs and had been unsuccessful in finding new jobs but the trial court imputed income to both husband and wife to set child support. This Court reversed the trial court's order and noted that

[t]he trial court found that both Plaintiff and Defendant had searched for employment, but both had been unsuccessful. Less clear from the order is whether the trial court found that Plaintiff and Defendant had acted in bad faith. Our general impression is that the trial court found no bad faith. However, a literal reading of this finding of fact suggests that the trial court found bad faith which was insufficient to impute income at a prior income level, but that it found bad faith that was sufficient to impute income at the minimum wage. Neither of the above interpretations of the trial court's order would support imputation of income at minimum wage.

Id. at 358, 739 S.E.2d at 560.

Based upon the prior orders for alimony and regarding discovery, Husband argues the trial court had recognized the need for Husband to pursue his job search for an "executive or engineering job" for which he was suited and to seek recovery for his termination from Company, but in its order, reversed course and found he should have settled his

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lawsuit with Company sooner and taken a lesser job instead of continuing to seek a job similar to his prior employment. For example, in the original 2012 alimony order, the trial court found

10. Defendant was terminated from his employment in 2012 and has been offered a severance package that includes compensation of \$255,000, vacation pay of \$12,500 and a bonus ranging from \$66,000 to \$89,000. Defendant has not accepted this severance package as he believes that he may be entitled to more money and/or reinstatement of his position. *Defendant is reasonably exercising his earning capacity and capabilities at the present time.*

(Emphasis added).

Despite the trial court's finding *in September 2012* that "*Defendant is reasonably exercising his earning capacity and capabilities at the present time,*" in the order on appeal, the trial court found that "Defendant Glenn Anthony Hill's *naïve indifference to earn any income from January 2012 to July 2015 is not justified.*" (Emphasis added). These findings are contradictory, at least for 2012. The trial court could perhaps find that Husband *was* reasonably exercising his earning capacity in 2012, even though he was unemployed and seeking a new job, but at some point between 2012 and 2015, his delay in finding a new job became unreasonable. We cannot determine from the order the point when this change occurred. And this date, if it exists, would be important, because it may be a pivotal date for purposes of looking back to impute income to Husband based upon bad faith in his job search and for modifying his support obligations.

Although the trial court was sympathetic to Husband's job search in 2012, it appears from the 2016 order that the trial court changed its view of Husband's continued unemployment. The prior order was entered in 2012, but Husband's unemployment continued until June of 2015. And based on other findings of fact, as Wife contends, the trial court might have based its imputation of income on Husband's excessive spending "in deliberate disregard for his support obligations" even while he was still unemployed and at the same time, unilaterally reducing his monthly payments to Wife from \$8,000.00 to \$300.00 – although as noted above, this still cannot explain the trial court's failure to modify the support obligations prior to June 2013.

The trial court detailed the unexplained decreases in Husband's bank account balances along with the drastic changes in Husband's lifestyle beginning in 2013, which coincided perfectly with his decision to

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reduce his payments by 96%, to \$300.00 and with meeting his girlfriend. Husband still had a balance of over \$100,000.00 in his bank account as of the end of 2012, and on 12 March 2013, he paid \$27,300.00 cash for a 2009 BMW two-door convertible.³ By the end of May 2013, his bank account was down to just over \$26,000.00 – a decrease of \$46,700.00 in just two and half months, although Husband was still “purportedly liv[ing] frugally” in a one bedroom of a home at that time. At just about this time, Husband met his girlfriend, now wife, on Match.com. In October 2013, Husband filled out a lease application for a new apartment in High Point where he stated his income as \$150,000.00 per year from GA Hill and Associates – although he testified he received no income from this business.⁴

A few months later, in January 2014, Husband received the proceeds from the settlement with Company, and he deposited \$251,098.95 into his savings account. By the end of January, Husband had withdrawn \$110,500.00 from the savings account – but he paid Wife only \$300.00 that month. By February 2014, he had moved to the apartment in High Point with his girlfriend. In June 2014, Husband got \$6,000.00 as a gift from his father to buy an engagement ring for his new girlfriend. In November 2014, he married her, and they had two formal weddings, one in Raleigh and one in China. By the end of 2014, his bank account balance was down to \$28,472.60 – and he was still paying Wife \$300.00 per month. And even after Husband got his new job in June 2015, he still did not resume paying alimony.

In addition, several findings note that the trial court determined Husband was not credible in his testimony and evidence regarding financial matters, including “his credit card debt or other loans” and his testimony about his new wife’s “income and employment status and her ability to share in the cost of their living expenses.” And as Wife stresses, the trial court found that Husband “indulged in excessive and unnecessary spending when he moved to High Point with his girlfriend (now his wife) and even more so when they moved to Reno, and continued to avoid his financial obligations to support his children and his ex-wife.”

3. A two-door convertible is not exactly a car suitable for three children, but Husband was not exercising his visitation with the children.

4. Husband organized GA Hill & Associates, LLC, through which he planned to operate “an import/export business with partners in China” in 2012. Husband claimed the business failed and he lost “tens of thousands of dollars.” The trial court did not find that Husband had income from this business or from the other business he attempted to start in China, but the trial court also did not find Husband’s testimony about these businesses credible.

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Husband responds that the findings do not address why it is “excessive and unnecessary spending” to get remarried and, after getting a new job, to buy a new house near his new job. The definition of “excessive” spending will vary depending upon the parties’ circumstances and certain types of expenses, such as housing and food, are necessities. *See, e.g., Beall v. Beall*, 290 N.C. 669, 678-79, 228 S.E.2d 407, 413 (1976) (“While some of [defendant’s living expenses] appear to be extravagant, or overestimated, and several might be eliminated, others are essential. Thus, if only the projected monthly rent (\$190.00); food (\$100.00); utilities (\$35.00) and car payments (\$204.00) are counted, defendant would still need \$529.00 monthly (\$6,348.00 annually) to support himself. However, income taxes, automobile insurance, and laundry must be paid; most certainly he will have medical expenses and other unexpected demands for money from time to time. Even so, his projected monthly expenditures of \$1,789.00 are beyond his means. We note that considered on an annual basis these expenses exceed defendant’s total maximum income as found by the trial court.”). Husband argues that the trial court did not distinguish what amounts, if any, of his expenditures were “extraordinary overspending” as opposed to reasonable living expenses. But the trial court’s findings carefully detail Husband’s bank account balances over time along with his actions in disregard of his support obligations. Husband was free to remarry, but payment of alimony or child support “may not be avoided merely because it has become burdensome, or because the husband has remarried and voluntarily assumed additional obligations.” *Crosby v. Crosby*, 272 N.C. 235, 238, 158 S.E.2d 77, 80 (1967) (citations and quotation marks omitted); *see also Frey*, 189 N.C. App. at 630, 659 S.E.2d at 67 (“Payment of support for a child of a former marriage may not be avoided merely because the husband has remarried and thereby voluntarily assumed additional obligations. Increases in expenses that were voluntarily assumed additional obligations, including entering into another marital and family relationship, although they may render the child support payments more burdensome, do not justify a reduction in such payments.” (Citations, quotation marks, brackets, and ellipses omitted)). These findings of Husband’s reduction in support payments coupled with his increased spending on his new life with his girlfriend and his ultimate remarriage primarily focus on the period when he was unemployed. Once he had a new job, there was no need for the trial court to impute income, and it did not, so his expenses based upon his remarriage, if any, did not affect the support calculations as reflected by the order after he began working for Ebara.

Yet we still have some concern about whether the erroneous finding of the date of Husband’s settlement with Company was a significant

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factor in the trial court's determination that Husband acted in bad faith and in its imputation of income to Husband. "In orders of child support, the trial court should make findings specific enough to indicate to the appellate court that due regard was taken of the requisite factors." *Burnett v. Wheeler*, 128 N.C. App. 174, 176, 493 S.E.2d 804, 806 (1997). Based on Findings Nos. 52, 53, and 61, it is possible that the trial court's change of attitude toward Husband's extended job search was influenced by the belief he had delayed the settlement for over a year after it would be reasonable and responsible to resolve the lawsuit, so he would have the funds from the settlement available, and the potential cloud hanging over his ongoing job search could be removed. In addition, although the trial court may have relied upon Husband's excessive spending in disregard of his support obligations as of June 2013, when he unilaterally reduced his support dramatically, his motion to modify child support extends back to March 2012. Even though he was still paying as ordered in March 2012, he could have been entitled to a reduction for any time period when he was involuntarily unemployed and not excessively spending or acting in bad faith. Because we cannot determine whether the trial court imputed income and the basis for imputation for each of the time periods, and especially prior to June 2013, we must remand to the trial court for correction of the date of the settlement with company and any revisions the trial court deems appropriate to the other challenged findings which rely on the erroneous date. If the trial court imputes income, it should state the basis for imputation for each time period.

We therefore reverse the trial court's erroneous findings regarding the date of the settlement with Company and related findings regarding Husband's delay in settlement and the imputation of income to Husband based on this refusal. On remand, the trial court shall correct the findings regarding the date of settlement and make any additional findings it deems fit based upon the correct date. In addition, the trial court shall clarify whether it imputed income to Husband from January 2012 until July 2015 and make any additional findings it deems fit regarding imputation of income, if the trial court is basing the support obligations upon imputation of income based upon bad faith or suppression of income.

B. Averaging of income

[2] Husband also argues that instead of imputing income, the trial court relied upon funds Husband actually received while he was unemployed, averaged retroactively over the period of unemployment. In the order,

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one analysis of Husband's income finds that he had no income for many months, but the trial court still kept the child support obligation at the same amount as it had been when Husband was earning over twice what he eventually began earning at his new job at Ebara and reduced alimony only by \$1,000.00 per month. The trial court also did another analysis of Husband's income, finding an average income over 34 months of \$13,432.00 per month.

Because the trial court considered the settlement funds from the Company and his new job in determining whether he was entitled to any reduction of either support obligation, Husband argues that "[t]his case exemplifies the perils of adjudication with '20/20 hindsight,' " and specifically, the prejudice that arises when adjudication of a motion to modify is long delayed -- in this case, roughly four years. He argues that by averaging out funds retroactively over the nearly four year period, the trial court was penalizing Husband for failure to pay in 2012 and 2013 as if he actually had those funds in 2012 and 2013. If Husband's motions to modify had been heard in 2012 -- before he had received any settlement funds, before he got a new job, and before he had even met his new wife -- the circumstances would have been much different. His job search had not been going on for long, and there would have been no way to know when he would actually find a job or how much it would pay, or when his lawsuit against Company would be resolved and how much the recovery would be.

Ultimately, the trial court found that "[d]espite his extended unemployment, there has been no significant change in [Husband]'s ability to pay child support to [Wife] since entry of the Order." In other words, the trial court found that although Husband was earning \$543,000.00 per year when the order was entered in 2011, and he was unemployed with no income for 42 months, and he got a new job in July 2015 making about half what he had been making in 2011, his ability to pay was not significantly changed even while he had no income. Mathematically, these numbers present an obvious question: how is an involuntary decrease in income from \$543,000.00 to zero not a significant change? During the 42 months Husband was unemployed, he would have needed \$336,000.00 to pay the \$8,000.00 per month he was required to pay. His only income during that time was the settlement from Company, in a gross amount of \$351,937.52; his net income left after taxes was \$251,098.95. He also had to pay attorney fees related to the settlement of \$29,000.00, leaving him with \$213,000.00. Even if he had used all of the settlement funds to pay his support obligations, he would still have had a shortfall of \$123,000.00. The trial court dealt with this mathematical

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problem by finding that “[t]he fact that [Husband’s] income decreased does not mean that he is entitled to a reduction in alimony or child support, especially when the needs of the minor children and [Wife] did not decrease (and actually increased) and he is able to make the payment as originally ordered by using his estate, notwithstanding his reduction in income.” The trial court recognized that Husband would have to deplete his estate to pay his support obligations.

In Finding No. 40, the trial court noted that in January 2012, Husband’s Wells Fargo checking account had a balance of \$363,227.36; he then transferred \$300,000.00 from this account to a Wells Fargo savings account. By 31 August 2013, this savings account was depleted down to \$6,009.94. The findings then detail various other bank account balances, deposits and withdrawals. The trial court found that “[d]uring this period, [Husband’s] total monthly support obligation to [Wife] was \$8,000.00” and at that time, Husband was living “frugally” in one bedroom apartments and he “offered no explanation as to how or why he dissipated his large cash accounts.” In June 2013, Husband stopped paying his support as ordered and paid only \$500.00 that month, then paid only \$300.00 per month from July 2013 to June 2015.

These findings show that Husband stopped receiving income as of January 2012, but continued to pay \$8,000.00 support each month through May 2013, a period of 17 months. Thus, he paid out \$136,000.00 to Wife, which would explain at least that portion of the depletion of his bank account, but would still leave \$227,227.36. Husband’s living expenses at that time were low, and the trial court is correct that Husband was depleting his account at a rate far beyond the amount needed to pay support, with no explanation of how he may have spent the additional \$227,227.36. In summary, the trial court determined that Husband still had or should have had sufficient funds to continue paying support as originally ordered by depleting his estate. It is correct that he could continue to pay \$8,000.00 per month, despite having no income, for a finite period with his savings account. The trial court also made findings regarding his remaining estate, although Husband notes those findings show that most of his remaining funds were in 401K accounts or other retirement accounts not readily accessible without incurring substantial taxes and penalties. The question is whether his support obligations can be set based upon depletion of his estate so that he must continue to pay support at the level set when his income was over \$500,000 per year, even when he had no income.

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C. Depletion of Estate

(1) Alimony

The original consent order entered on 15 March 2011 and the alimony order entered on 12 September 2012 both required Husband to pay alimony of \$4,500.00 per month. The order on appeal reduced alimony to \$3,500.00 per month, effective as of 1 October 2012. Although the trial court reduced his alimony obligation, Husband argues that the trial court abused its discretion by not reducing his alimony sufficiently. His income was over \$500,000.00 annually when the \$4,500.00 obligation was established, but he had no income other than the settlement proceeds from 12 January 2012 until 29 June 2015, when he was hired by Ebara. Again, husband argues the trial court based the modified alimony on hindsight, since by the time of trial, his period of unemployment had ended. Wife essentially acknowledges the trial court's hindsight, arguing that "to whatever extent [Husband] had no income on the date that he filed his motion to modify alimony, that condition was cured by the Company Lawsuit settlement he received in early 2014 and his employment with Ebara in July 2015." She argues the trial court made extensive findings of Husband's "excessive and unnecessary spending to avoid his support obligations" during his period of unemployment and acted within its discretion in modifying alimony.

An alimony order "may be modified or vacated at any time, upon motion in the cause and showing of changed circumstances by either party or anyone interested." N.C. Gen. Stat. § 50-16.9(a) (2017). The party moving for a modification bears the burden of showing "a substantial change in conditions" so "the present award is either inadequate or unduly burdensome." *Britt v. Britt*, 49 N.C. App. 463, 470, 271 S.E.2d 921, 926 (1980). We review the trial court's determination of the amount of alimony for abuse of discretion. *See, e.g., Kelly v. Kelly*, 228 N.C. App. 600, 601, 747 S.E.2d 268, 272-73 (2013) ("Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion. When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. An abuse of discretion has occurred if the decision is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." (Citations omitted)).

When setting alimony, the trial court must consider and make findings of fact on the factors in N.C. Gen. Stat. § 50-16.3A (2017), but if the

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trial court has made the required findings, the amount of alimony is not reviewable absent an abuse of discretion. *See Works*, 217 N.C. App. at 350, 719 S.E.2d at 221 (“It is well-established that the amount of alimony is determined by the trial judge in the exercise of her sound discretion and is not reviewable on appeal in the absence of an abuse of discretion, and that a ruling committed to a trial court’s discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.” (Citations, quotation marks, and brackets omitted)). To modify an alimony obligation set by a prior order, the trial court must compare the current financial situation to the time when the prior alimony order was entered, to see if there has been a change in the financial needs of the dependent spouse or in the ability to pay of the supporting spouse:

As a general rule, the changed circumstances necessary for modification of an alimony order must relate to the financial needs of the dependent spouse or the supporting spouse’s ability to pay.

....

To determine whether a change of circumstances under G.S. 50-16.9 has occurred, it is necessary to refer to the circumstances or factors used in the original determination of the amount of alimony awarded under G.S. 50-16.5. That statute requires consideration of the estates, earnings, earning capacity, condition, accustomed standard of living of the parties and other facts of the particular case in setting the amount of alimony.

Rowe v. Rowe, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982) (citations omitted).

As a general rule, a supporting spouse will not be required to deplete his estate to pay alimony. *See, e.g., Beaman v. Beaman*, 77 N.C. App. 717, 722, 336 S.E.2d 129, 132 (1985) (“Ordinarily, the parties will not be required to deplete their estates to pay alimony or to meet personal expenses.”). But sometimes, where the estate of the dependent spouse is not sufficient to meet her reasonable needs, and the estate of the supporting spouse is not sufficient to meet his own needs in addition to payment of alimony, the trial court may consider whether depletion of the supporting spouse’s estate would be fair. *See, e.g., Swain v. Swain*, 179 N.C. App. 795, 799, 635 S.E.2d 504, 507 (2006). Although some cases from our Supreme Court

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appear to disfavor alimony awards that result in estate depletion for one party or the other, those decisions by no means prohibit such awards. Rather, all of these cases cite “fairness and justice to all parties” as the principle to which an alimony award must conform. Thus, we consider whether the court’s award in the present case is fair to all of the parties.

Id. (citations omitted).

In considering whether depletion of the estate is fair, the trial court must compare the estates and needs of the parties. *See generally id.* In prior cases, some of the important factors were the difference between the estates, the rate at which each party would need to deplete his or her estate, the prospects for either party to improve his or her earnings in the future, and the term of payment of the alimony. *See id.* (“Considering that plaintiff’s estate is substantially larger than defendant’s estate, it would be unfair to require defendant to further deplete her estate while allowing plaintiff to maintain his. Instead, the trial court ordered a reduction in alimony from \$4,300 per month to \$3,600 per month. This award does not fully meet defendant’s living expenses and is greater than plaintiff’s disposable income after meeting his own expenses. Because the award requires both parties to deplete their estates to meet their living expenses, the trial court’s reduction of alimony was fair to both parties, and the trial court did not abuse its discretion.”).

In *Williams v. Williams*, this Court discussed the comparison of estates of the dependent and supporting spouses:

The financial worth or “estate” of both spouses must also be considered by the trial court in determining which spouse is the dependent spouse. We do not think, however, that usage of the word “estate” implies a legislative intent that a spouse seeking alimony who has an estate sufficient to maintain that spouse in the manner to which he or she is accustomed, *[t]hrough estate depletion*, is disqualified as a dependent spouse. Such an interpretation would be incongruous with a statutory emphasis on “earnings,” “earning capacity,” and “accustomed standard of living.” It would also be inconsistent with plain common sense. If the spouse seeking alimony is denied alimony because he or she has an estate which can be spent away to maintain his or her standard of living, that spouse may soon have no earnings or earning capacity and therefore no way to maintain *any* standard of living.

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We think, therefore, that the trial court consideration of the “estates” of the parties is intended primarily for the purpose of providing it with another guide in evaluating the earnings and earning capacity of the parties, and not for the purpose of determining capability of self-support through estate depletion. We think this is equally true in giving consideration to the estate of the alleged supporting spouse. Obviously, a determination that one is the supporting spouse because he or she can maintain the dependent spouse at the standard of living to which they were accustomed through estate depletion could soon lead to inability to provide for either party.

Defendant argues that awarding alimony to this plaintiff would result in maintaining “not the wife, but her wealth.” He argues that compelling the husband to build up by alimony a “treasure hoard for the wife” has been consistently rejected. Nothing in this decision is designed to allow plaintiff to increase her wealth at the expense of defendant. Under the guidelines established, plaintiff would be required to continue in expending *all* of her annual income if she desires to maintain her present standard of living. Should the wife’s capital assets increase in value, through inflation, prudent investment or otherwise, and results in an increase of her income, defendant would, of course, be entitled to petition the court for modification of the alimony order under G.S. 50-16.9.

Williams v. Williams, 299 N.C. 174, 183-84, 261 S.E.2d 849, 856-57 (1980) (citations omitted).

Here, the trial court made extensive and detailed findings of fact comparing the financial circumstances of the parties, addressing all of the factors under N.C. Gen. Stat. § 50-16.3A. Relevant to Husband’s argument regarding depletion of his estate, the trial court made findings comparing: (1) Husband’s excessive spending, failure to pay any alimony, and voluntary increase in living expenses while still unemployed to Wife’s reduction of her living expenses; (2) Husband’s substantial estate even after his period of unemployment to Wife’s depletion of her estate; (3) Husband’s high income to Wife’s much lower income; and (4) the time period of the alimony payments.

In regards to the time period of the alimony payments, the term was set as 10 years from the initial order in 2012, so Husband’s obligation

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will end in 2022, unless sooner modified based on future changes or terminated by Wife's remarriage or death. The trial court did have the benefit of hindsight in considering the extent to which Husband would need to deplete his estate to pay alimony over the entire ten-year term, most of which is now past. But for purposes of considering the fairness of the alimony award overall, it was proper for the trial court to take Husband's current job and earnings into account, even for prior years. As of the date of hearing, Husband was employed and now has adequate earnings to continue paying current alimony as ordered with little if any ongoing depletion of his estate; he also has the ability to pay the accrued alimony without an unreasonable depletion of his estate. In comparison, Wife has already depleted much of her estate, despite her reduction in her living expenses, and since her income is not sufficient to meet her reasonable needs, she would quickly deplete the remainder of her estate and still could not maintain herself without alimony as ordered. The trial court did not abuse its discretion by basing the alimony award on a combination of Husband's estate and his current income, recognizing that his estate would be depleted to maintain the alimony obligation during his time of unemployment, even in the absence of bad faith or imputation of income for purposes of alimony. The trial court correctly considered the comparison of the estates of the parties for purposes of modification of alimony and did not abuse its discretion in modifying alimony effective back to the date of Husband's motion to modify alimony based upon depletion of his estate.

(2) Child Support

Although depletion of Husband's estate may be a proper basis to establish the alimony obligation, the same is not necessarily true for child support. On child support, as discussed above, it appears the trial court may have used either imputation of income or averaging of income over Husband's period of unemployment. Wife argues that although the trial court could have imputed income for purposes of child support, "the Order itself also reveals that the trial court did not actually impute income for purposes of modifying [child support]." Although depletion of Husband's estate can be appropriate as to alimony, based upon the factors the trial court may consider under N.C. Gen. Stat. § 16.3A in setting alimony, those factors do not apply to child support. We cannot find any cases allowing an award of child support based solely on depletion of the payor's estate *absent* bad faith or suppression of earning capacity. Therefore, the trial court was not authorized to base the child support modification prior to Husband's new job with Ebara *solely* upon depletion of his estate, and we must remand for additional findings to clarify

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whether the trial court is actually imputing income for purposes of child support, and if so, the basis for imputing income for each time period.

D. Mathematical error in alimony arrears

[3] Husband also argues that the trial court made a mathematical error in the calculation of his alimony arrears. The trial court found Husband owed 35 payments of alimony of \$3,500.00 per month from June 2013 until March 2016, but alimony was reduced effective as of 1 October 2012. From October 2012 to May 2013, Husband paid eight payments of \$4,500.00 per month, or \$1,000.00 per month more than the modified obligation, so he actually paid \$8,000.00 for which he was not given credit in the order. Wife did not respond to this argument in her brief. On remand, the trial court should correct this mathematical error and determine the correct amount of alimony arrears owed.

II. Civil Contempt

A. Application of N.C. Gen. Stat. § 5A-21

[4] Husband first argues the trial court erred as a matter of law by holding him in contempt based upon “its application of the civil contempt statute.” (Original in all caps). Husband’s argument is based upon N.C. Gen. Stat. § 5A-21(a) (2017):

- (a) Failure to comply with an order of a court is a continuing civil contempt as long as:
 - (1) The order remains in force;
 - (2) The purpose of the order may still be served by compliance with the order;
 - (2a) The noncompliance by the person to whom the order is directed is willful; and
 - (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a)(1)-(3).

The order on appeal held Husband in contempt for his failure to pay child support and alimony “from June 2013 through March 2016,” and for failure to pay the children’s uninsured health care costs “through March 2016.” But the same order also modified Husband’s alimony obligation effective as of 1 October 2012. (His child support obligation was not modified during the time he was unemployed, although as discussed

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above, it is possible that it may be modified on remand.) Therefore, the contempt period overlaps with the modification period. Husband argues that he was held in contempt of orders “that were either in whole or in part no longer in effect as of the dates for which the contempt was assessed,” in violation of N.C. Gen. Stat. § 5A-21(a)(1) and (2) “because these orders did not ‘remain[] in force’ at the operative time of the supposed contempt.”

Neither Husband nor Wife cites any cases directly relevant to Husband’s argument that he cannot be held in contempt of a prior order simultaneously with the modification of the prior order. Of course, Husband is the party who moved to modify the prior orders asking to decrease his support obligations effective as of the date of his filing of the motion to modify. It is well-established that the trial court may modify a support obligation effective as of the date of the motion requesting modification. *See, e.g., Mackins v. Mackins*, 114 N.C. App. 538, 546, 442 S.E.2d 352, 357 (1994) (“[J]ust as the trial court has the discretion to modify an alimony award as of the date the petition to modify is filed, the trial court also has the discretion to modify a child support order as of the date the petition to modify is filed.”).

Husband bases his argument on the language of N.C. Gen. Stat. § 5A-21(a)(1)-(3), so we must interpret this statute. Statutory interpretation presents a question of law, which we review *de novo*:

We review issues of statutory construction *de novo*. In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished. Legislative purpose is first ascertained from the plain words of the statute. A statute that is clear on its face must be enforced as written. Courts, in interpreting the clear and unambiguous text of a statute, must give it its plain and definite meaning, as there is no room for judicial construction. . . .

In applying the language of a statute, and because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used. Finally, we must be guided by the fundamental rule of statutory construction that statutes *in pari materia*, and all parts thereof, should be construed together and compared with each other.

In re Ivey, __ N.C. App. __, __, 810 S.E.2d 740, 744 (2018) (citations, quotation marks, and brackets omitted).

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Under the plain words of the statute, failure to comply with an order may be contempt if “(1) The order remains in force”; and “(2) The purpose of the order may still be served by compliance with the order.” N.C. Gen. Stat. § 5A-21(a)(1)-(2). Husband argues that because the trial court modified alimony obligation in the prior order effective as of the filing of his motion – at his request – the prior order was no longer “in force” as of the date of the order holding him in contempt. *See id.* But the child support and alimony orders did not disappear, and there has been a support order “in force” continuously since the entry of the first order. *Id.* If we read subsection (1) along with subsection (2), the modification of some portions of the prior order does not necessarily render it impossible for Husband to be held in contempt for failure to pay his support obligations because the order is still “in force.” *Id.* It is clear that “[t]he purpose of the order” is “still . . . served by compliance with the order.” *Id.* The purpose of the order was and is to provide support for Wife and the children; even if the exact amount of the support obligation in the prior order changed, the other portions of the order were unchanged. A modification of an order effective as of a date in the past is to some extent a legal fiction; it has the legal effect of reaching back to change the past, but in reality, the past cannot change.

We must also consider the remainder of the statute along with the modifications of the order. To be held in contempt, “(2a) The noncompliance by the person to whom the order is directed [must be] willful; and “(3) The person to whom the order is directed [must be] able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.” *Id.* Depending upon the particular modification of an order, it would be possible that the noncompliance could not be considered “willful.” *Id.* For example, if an order were modified to increase a support obligation, the payor could not be held in contempt for failure to pay the increased amount in the past, as that failure to pay more in the past could not be willful. Here, the trial court’s modification was a reduction of alimony – and child support remained the same – so the prior order “remained in force” for the child support obligation and for alimony up to the newly reduced amount of \$3500.00. *Id.* Had Husband failed to pay his full alimony obligation as previously ordered, \$4,500.00, but did pay as much as the new reduced amount of \$3,500.00, he could not be held in contempt, since in such a scenario, Husband would have paid as much as required under the modified order – even if the motion for contempt was filed before the order was modified and he was obligated at the time to pay a greater amount.

In addition, the purpose of N.C. Gen. Stat. § 5A-21 particularly in the context of child support and alimony enforcement, could be subverted

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by Husband's interpretation of the statute. Where a child support or alimony obligor has valid reason for a reduction of his obligation, he could simply file a motion to modify the support obligation and stop paying support entirely until the trial court enters an order. In the meantime, the recipient of the support could file a motion to hold him in contempt, but he may be insulated from being held in contempt, even if he paid nothing, if the order is later modified effective as of the date of his motion. Although a payor has the right to file a motion to reduce his obligation and may have that reduction effective back to the date of filing, he does not have the right to entirely avoid his support obligation until the motion is heard simply by moving for modification. *See generally Chused v. Chused*, 131 N.C. App. 668, 672-73, 508 S.E.2d 559, 562 (1998) ("A supporting parent has no authority to unilaterally modify the amount of the court ordered child support payment. The supporting parent must first apply to the trial court for modification. The trial court then has the authority to enter a modification of court ordered child support, retroactive to the filing of the petition of modification. If a person unilaterally reduces his court ordered child support payments, he subjects himself to contempt." (Citations, quotation marks, and brackets omitted)). Thus, the trial court did not err by holding Husband in contempt of the prior orders while also setting his arrears owed based upon the modified alimony obligation. Nevertheless, because we must remand for a new order addressing the modification of child support and alimony arrearages as discussed above, it is possible that the amounts of arrears and purge payments may change. We therefore must also reverse and remand the contempt order so the trial court may address whether Husband is in willful civil contempt and if so, to determine the revised amounts of arrearages owed and purge conditions in the new order.

B. Notice of acts of noncompliance

[5] Husband's second argument on contempt is that he did not have notice of the acts for which he may be held in contempt because the Motion and Show Cause Order were both filed on 31 July 2013. He argues that the Motion gave notice of alleged noncompliance only up to 31 July 2013, but the trial court held him in contempt for failure to pay child support and uninsured medical costs which accrued after that date.

Wife argues that Husband waived any argument on notice of the acts for which he may be held in contempt by failing to raise this objection at trial. We agree. Where Husband actively participated in the trial without raising any objection or argument regarding notice of the acts for which he may be held in contempt, he has waived this argument on appeal. *See Watson v. Watson*, 187 N.C. App. 55, 63, 652 S.E.2d 310, 316 (2007)

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("[D]efendant did not object to the presentation of evidence on this issue at the contempt hearing. On the contrary, defendant presented evidence relating to the credit card debt, including offering exhibits. When the contemnor comes into court to answer the charges of the show cause order, she waives procedural requirements. Defendant's active participation in the hearing on this issue, without objection, defeats her contention that she was without notice that the 5 June 2006 proceeding would include a review of her failure to take responsibility for the credit card payments." (Citations, quotation marks, and brackets omitted)); *see also Byrd v. Byrd*, 62 N.C. App. 438, 443, 303 S.E.2d 205, 209 (1983) ("[W]hen issues not raised in the pleadings are tried by the express or implied consent of the parties, North Carolina allows for the pleadings to be amended to conform to the evidence. Where a party offers evidence at trial which introduces a new issue and there is no objection by the opposing party, the opposing party is viewed as having consented to the admission of the evidence and the pleadings are deemed amended to include the new issue." (Citation omitted)). In this case, Husband participated in the trial on the issues of contempt up to the date of the hearing without objecting to any of this evidence or claiming any lack of notice. Accordingly, this argument is without merit.

III. Award of Attorney Fees

[6] Finally, Husband argues that the trial court erred as a matter of law "in ordering defendant to pay plaintiff's attorney's fees as a 'combined' award and otherwise in contravention of the applicable statutes." (Original in all caps). Husband contends that because the fee award of \$50,000.00 did not differentiate between the amounts awarded for each claim -- modification of child support, modification of alimony, and contempt -- this Court is unable to determine Wife's entitlement to the entire award. Husband also argues that the trial court erred in awarding fees for various reasons for each claim: child support modification, alimony modification, and contempt. As explained in more detail below, if there were adequate findings to support Wife's entitlement to attorney fees on all three claims, the award would be proper, but there are a few missing pieces, so we must vacate the award and remand to the trial court for additional findings, conclusions of law, and a new order as appropriate based on those findings and conclusions.

We review the trial court's determination that Wife is entitled to an award of attorney fees based upon N.C. Gen. Stat. § 50-13.6 (2017) *de novo*, since this is a question of law, and we review the amount of the fees for abuse of discretion:

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In a custody suit or a custody *and* support suit, the trial judge, pursuant to the first sentence in G.S. 50-13.6, has the discretion to award attorney's fees to an interested party when that party is (1) acting in good faith and (2) has insufficient means to defray the expense of the suit. The facts required by the statute must be alleged and proved to support an order for attorney's fees. Whether these statutory requirements have been met is a question of law, reviewable on appeal. When the statutory requirements have been met, the amount of attorney's fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion. . . .

When the action is *solely* one for support, all of the requirements set forth in part III A above apply *plus* the second sentence in G.S. 50-13.6 which requires that there be an additional finding of fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding. A finding of fact supported by competent evidence must be made on this issue in addition to meeting the requirements of good faith and insufficient means before attorney's fees may be awarded in a support suit. This issue is a question of law, reviewable on appeal.

Hudson v. Hudson, 299 N.C. 465, 472-73, 263 S.E.2d 719, 724 (1980) (citations, quotation marks, and brackets omitted).

Husband argues that the trial court erred as a matter of law in awarding attorney fees on all three claims. He does not challenge the amount of the award except to note that since the award is undifferentiated, it is impossible to break it down into portions awarded for each claim, so if the trial court erred in awarding fees for even one of the three claims, the award cannot stand.

A. Entitlement to fees for modification of child support

North Carolina General Statutes Section 50-13.6 sets forth the statutory requirements for an award of attorney fees in child support claims:

Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is

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adequate under the circumstances existing at the time of the institution of the action or proceeding. . . .

N.C. Gen. Stat. § 50-13.6 (emphasis added).

The trial court found: “128. [Husband] refused to provide support which is adequate under the circumstances.” The trial court did not include the last portion of the finding required by N.C. Gen. Stat. § 50-13.6: “*existing at the time of the institution of the action or proceeding.*” See *id.* Husband argues that the “time of the institution of the action or proceeding” was when he filed his motion to modify child support, 7 February 2012. *Id.* The circumstances existing as of February 2012 were that both Husband and Wife were unemployed *and* Husband was still paying his full child support as required by the order. Wife relies upon the definition of an “action” from Black’s Law Dictionary, see *action*, Black’s Law Dictionary (10th ed. 2014), to argue that “the appropriate time for measuring the adequacy of Defendant’s support pursuant to [N.C. Gen. Stat.] § 50-13.6 was July 31, 2013 [when she filed a motion for contempt] through the time of trial in April 2016” During that time period, Wife argues, Husband had “started his spending spree” and “had access to sufficient cash from his estate.”

We cannot find any case which specifically defines the phrase “at the time of the institution of the action or proceeding,” N.C. Gen. Stat. § 50-13.6, perhaps because this simple phrase has not been at issue in any prior case. But many cases refer to the dates when various types of actions or proceedings were *instituted*, and invariably, the cases use the date when a pleading or motion bringing a claim or seeking a particular type of relief was filed with the court as the date of the “institution of the action or proceeding.” N.C. Gen. Stat. § 50-13.6; see, e.g.; *Danielson v. Cummings*, 43 N.C. App. 546, 546, 259 S.E.2d 332, 332 (1979) (“Plaintiff instituted this action on 15 February 1978 alleging he was injured by the negligence of the defendants in an automobile collision in the city of Greensboro.”), *aff’d*, 300 N.C. 175, 265 S.E.2d 161 (1980). Black’s Law Dictionary defines the verb “institute” as “to begin or start; commence.” See *institute*, Black’s Law Dictionary (10th ed. 2014). We simply cannot read the phrase “under the circumstances existing *at the time of the institution* of the action or proceeding[,]” N.C. Gen. Stat. § 50-13.6, to refer to a period of time extending from the date of a filing of a pleading to the date of the trial – here, nearly three years, according to Wife. We must consider a particular date of filing – but many motions have been filed in this case.

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Since we are now addressing entitlement to an attorney fee award for modification of child support, not contempt, the date of the institution of the action for purposes of determining entitlement to attorney fees under N.C. Gen. Stat. § 50-13.6 is based upon the filing of Husband's motion to modify child support, not Wife's later motion for contempt. *See generally* N.C. Gen. Stat. § 50-13.6. Wife has a claim for attorney fees based upon her contempt motions as well, but the standard for that award differs from an award for modification of child support, and the contempt issue must be considered in its own right. *See, e.g., Watson*, 187 N.C. App. at 69, 652 S.E.2d at 320 ("It is settled law in North Carolina that ordinarily attorney fees are not recoverable as an item of damages or of costs, absent express statutory authority for fixing and awarding them. Generally, attorney's fees and expert witness fees may not be taxed as costs against a party in a contempt action. However, our courts have ruled that the trial court may award attorney's fees in certain civil contempt actions." (Citations omitted)).

On child support, there is no finding as to whether Husband was providing "support which is adequate under the circumstances existing *at the time of the institution of the action or proceeding*." N.C. Gen. Stat. § 50-13.6. Wife argues that the essential facts are evident in the trial court's order and there was no conflicting evidence on this point. But the "essential fact" which is evident in the order is that in February 2012, Husband was unemployed on the date he "instituted" the proceeding by filing a motion to modify the child support obligation and he was still paying his full child support obligation. Since he was still paying his full child support obligation "at the time of the institution of the action or proceeding," he did not "refuse" to "provide support which is adequate" at that time. *Id.* He did stop paying the full child support obligation later, but that is not the question under N.C. Gen. Stat. § 50-13.6. *Id.*

This is not the end of the analysis, since Wife also filed a motion to modify child support on 13 November 2012. Wife alleged in this motion, upon information and belief, that Husband was already receiving severance pay checks from Company and also requested modifications related to the children's medical insurance coverage. But the trial court found that although Company had tendered checks to Husband, he had refused to accept these payments, since he was pursuing the lawsuit against Company seeking a greater recovery. And, as of November 2012, Husband was continuing to pay the full child support obligation under the existing order, so he was still paying adequate support at the time of institution of Wife's motion to modify child support. Therefore, the attorney fee award under N.C. Gen. Stat. § 50-13.6 could not be based upon Wife's motion to modify child support either.

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The “circumstances existing” as of the dates of institution of both motions for modification of child support differed greatly from those over the following two years and at the time of trial. *Id.* The trial court therefore erred to the extent it awarded attorney fees for the modification of child support based upon N.C. Gen. Stat. § 50-13.6, since Husband was still paying his full obligation at the time of institution of both motions to modify child support. For this reason, and because the trial court awarded fees without specifying the basis, we vacate the attorney’s fee award.

B. Entitlement to attorney fees on other claims

Husband also argues on the award of attorney fees that there is no way for this court to assess the “reasonableness” of the award on each claim. For example, Husband’s child support obligation was increased, but his alimony obligation was decreased. In addition, the required findings for an attorney fee award for modification of alimony and contempt are not identical. We will not address these issues further, since we must vacate the attorney fee award for the reasons already discussed. On remand, the trial court should make the required findings of fact and conclusions of law for the attorney fee award on each component of the award and determine the appropriate amount of fees for each claim.

Conclusion

For the reasons stated above, we affirm in part and reverse in part and remand the trial court’s order modifying alimony and child support. Because the trial court’s alimony order was supported by its findings regarding depletion of the estates of the parties, we affirm the trial court’s modification of alimony, both for the past and for prospective alimony. However, the trial court shall correct the mathematical error in the alimony arrears on remand. The basis for the modification of the child support from the date of Husband’s motion to modify until July 2015 is unclear, so we reverse this portion of the order and on remand the trial court must clarify whether it is imputing income to Husband during each time period, the basis for imputation, the amount of income imputed, and how the child support obligation was calculated. The prospective child support order as of July 2015 is affirmed. We also conclude the trial court did not err in finding Husband in civil contempt, but because we have reversed and remanded the child support provisions of the order, we must also reverse and remand the contempt portion of the order so the trial court may enter a new order to address whether Husband is in willful civil contempt in accord with any changes to alimony arrears or child support and child support arrears owed on

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remand. Finally, we reverse the order on attorney fees and remand to the trial court for entry of a new order on attorney fees setting forth the amounts of fees awarded for each component of the case, with the findings of fact and conclusions of law needed to support fees awarded for each component of the case.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Judges DILLON and INMAN concur.

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY
DAVID L. FRUCELLA AND MARILYN L. FRUCELLA DATED JUNE 28, 1985 AND
RECORDED IN BOOK 5044 AT PAGE 764 IN THE MECKLENBURG COUNTY PUBLIC
REGISTRY, NORTH CAROLINA

No. COA18-212

Filed 2 October 2018

**Mortgages and Deeds of Trust—foreclosure—power of sale—lost
note**

The trial court properly concluded that CitiMortgage, Inc. was the holder of a note and was entitled to proceed with a power of sale foreclosure on respondents' home where affidavits of a CitiMortgage loan officer satisfied the three-part test for entitlement to enforce a lost instrument pursuant to UCC § 25-3-309.

Appeal by respondents from order entered 3 October 2017 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 September 2018.

*Nelson Mullins Riley & Scarborough, L.L.P., by Donald R. Pocock,
for petitioner-appellee.*

*Thurman, Wilson, Boutwell & Galvin, P.A., by James P. Galvin, for
respondents-appellants.*

ZACHARY, Judge.

David and Marilyn Frucella ("Respondents") appeal from a trial court's order allowing CitiMortgage, Inc. to foreclose on their home under the power of sale provision in their deed of trust, arguing that

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CitiMortgage was not the holder of the Note, which was lost. We find that CitiMortgage satisfied the statutory provisions for enforcement of a lost note, and was permitted by law to enforce the Note. Therefore, we affirm the trial court's order.

Background

On 28 June 1985, Respondents executed an Adjustable Rate Note ("Note") in the amount of \$191,000 for their new home on Wharton Lane in Matthews, North Carolina, naming The Lomas & Nettleton Company as lender. On that same day, Respondents executed a deed of trust on the property to secure the loan evidenced by the Note. The deed of trust contained a power of sale clause permitting the lender to sell the residence in the event the Frucellas defaulted on their obligation to pay the Note. On 5 November 1997, an instrument titled "Substitution of Trustee" was recorded, providing in part that "Crestar Bank is now the owner and holder of said Note and lien created by the foregoing Deed of Trust[.]" On 21 January 2003, another document titled "Substitution of Trustee" was recorded, providing in part that "SunTrust Bank, Inc. is now the owner and holder of said Note and lien created by the foregoing Deed of Trust."

Respondents made their last payment on the Note on 10 August 2010, bringing the loan current through June 2010. Nine months later CitiMortgage, acting as the attorney-in-fact for The Lomas & Nettleton Company, assigned the deed of trust at issue to CitiMortgage. Respondents were then given notice of their default by letter from CitiMortgage on 23 December 2010. A non-judicial foreclosure proceeding was commenced on 20 June 2011, but was dismissed without prejudice by order of the Clerk on 1 April 2013.

Another non-judicial foreclosure proceeding was commenced on 28 January 2015 and was heard before the Clerk of Superior Court of Mecklenburg County on 5 April 2017, and the Clerk entered an Order allowing the foreclosure sale. Respondents appealed to Superior Court, and this matter was heard by the Honorable Carla N. Archie on 24 August 2017. At the hearing, the trial court was presented with two lost note affidavits of April Daniels, employed by CitiMortgage as an Assistant Vice President, Assistant Officer Legal Support. One of the Daniels affidavits stated that subsequent to the execution of the Loan, the Note was transferred to CitiMortgage and that after the Loan was transferred, the original Note was lost. The other Daniels affidavit stated, *inter alia*, that: (1) "At the time CitiMortgage, Inc. lost possession of the original Note, such party had the right to enforce the Note and Deed of Trust[.]" (2) "The loss of possession of the Note is not the result of the original

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Note being assigned, endorsed, or delivered to another party, cancelled, pledged, hypothecated or otherwise transferred, nor was the loss of possession the result of a lawful seizure of the Note[.]" and (3) "After a good faith, thorough and diligent manual search, the hard copy collateral file pertaining to the Loan (which pursuant to CitiMortgage, Inc.'s regular business practice would be expected to contain the original note) was not located."

On 3 October 2017, the trial court entered an order allowing the foreclosure sale. The trial court found:

12. After the Note and Deed of Trust were transferred to CitiMortgage, the original Note was lost. CitiMortgage offered testimony by affidavit that 1) CitiMortgage was in possession at the time the original Note was lost or destroyed; 2) after a good faith, thorough and diligent manual search, CitiMortgage was not able to locate the Note; 3) The loss of possession was not the result of the Note being assigned, endorsed, delivered to another party, cancelled, pledged, hypothecated [or] otherwise transferred.

....

14. The right to enforce the lost note constitutes a valid debt as described in [N.C. Gen. Stat.] § 45-21.16(d) of which CitiMortgage is the holder. . . .

15. Respondents have presented no credible evidence tending to show that any other entity is the holder of the debt or there is an actual controversy regarding CitiMortgage's status as the holder. Namely, Respondents have not shown there is another person or entity other than CitiMortgage seeking to enforce the debt. At best, Respondents presented documents tending to show there are other entities who previously had some interest or may have some interest in the outcome of these proceedings. Respondents did not present any evidence tending to show any entities are presently adverse to CitiMortgage or that Respondents are in danger of making duplicate payments.

Respondents filed timely notice of appeal.

Analysis

Respondents maintain that the trial court erred in permitting the foreclosure sale because CitiMortgage was not the holder of the Note as

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required by N.C. Gen. Stat. § 45-21.16(d) (2017). As explained below, we reject this argument and affirm the order of the trial court.

CitiMortgage's Authority to Seek Non-Judicial Foreclosure

When this court reviews a trial court's order permitting a foreclosure sale, where the trial court sat without a jury, "findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary." *In re Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013). Unchallenged findings of fact are presumed correct and binding on appeal. *In re Schipof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008). On appeal, the trial court's conclusions of law are reviewable *de novo*. *Bass*, 366 N.C. at 467, 738 S.E.2d at 175.

Our General Assembly has established a procedure to avoid lengthy and costly judicial foreclosures and instead has permitted parties to expeditiously resolve mortgage defaults via a non-judicial power of sale if authorized in the parties' mortgage or deed of trust. See N.C. Gen. Stat. § 45-21.16 (2017); 1 Patrick K. Hetrick and James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 13.31 (Matthew Bender, 6th Ed. 2011). This Court has explained a power of sale as follows:

A power of sale is a contractual arrangement in a mortgage or a deed of trust which confers upon the trustee or mortgagee the power to sell the real property mortgaged without any order of court in the event of a default. A power of sale provision in a deed of trust is a means of avoiding lengthy and costly foreclosures by action, whereby the parties have agreed to abandon the traditional foreclosure by judicial action in favor of a private contractual remedy to foreclose.

In re Adams, 204 N.C. App. 318, 321, 693 S.E.2d 705, 708 (2010) (citations, internal brackets, and quotation marks omitted). This procedure provides for a hearing before the clerk of court in the county where the land is located. N.C. Gen. Stat. § 45-21.16(d) (2017). The statute strictly details the evidence the clerk can receive and the findings the clerk can make:

Upon such hearing, *the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents*. If the clerk finds the existence of (i) *valid debt of which the party seeking*

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to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b), or if the loan is a home loan under G.S. 45-101(1b), that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed, and (vi) that the sale is not barred by G.S. 45-21.12A, then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article.

Id. (emphasis added). The clerk's ruling may be appealed *de novo* to a district or superior court judge having jurisdiction within ten days of the clerk's ruling. *Id.* § 45-21.16(d1).

Under the Uniform Commercial Code ("UCC"), as adopted in North Carolina, the "[h]older" of a note is defined as: "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession[.]" *Id.* § 25-1-201(d)(21)(a). When an entity no longer possesses the note or has lost the note, it may nevertheless prove the existence of a valid debt. *See id.* §§ 25-3-301, -309(a). Section 25-3-309 of the UCC provides a three-part test of the entitlement to enforce a lost instrument:

A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

Id. § 25-3-309(a). Both statute and case law sanction the use of affidavits as competent evidence to establish the required statutory elements in a *de novo* foreclosure hearing. *Id.* § 45-21.16(d) ("[T]he clerk shall consider the evidence of the parties and may consider . . . affidavits[.]"); *In re Goddard and Petersen, PLLC*, ___ N.C. App. ___, ___, 789 S.E.2d 835, 844 (2016). *See also Emerald Portfolio, LLC v. Outer Banks/Kinnakeet*

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Assocs., LLC, __ N.C. App. __, __, 790 S.E.2d 721, 723 (2016) (party seeking to enforce lost note used an affidavit setting out § 25-3-309 elements to enforce a lost note).

Respondents argue that CitiMortgage cannot seek a non-judicial power of sale foreclosure because it is not the holder of the Note due to loss of the Note. This argument is without merit.

Here, applying the lost note statute, the trial court found:

12. After the Note and Deed of Trust were transferred to CitiMortgage, the original Note was lost. CitiMortgage offered testimony by affidavit that 1) CitiMortgage was in possession at the time the original Note was lost or destroyed; 2) after a good faith, thorough and diligent manual search, CitiMortgage was not able to locate the Note; 3) The loss of possession was not the result of the Note being assigned, endorsed, delivered to another party, cancelled, pledged, hypothecated [or] otherwise transferred.

This finding of fact tracks the required elements to establish that a party not in possession of an instrument is nonetheless entitled to enforce the instrument as set out in N.C. Gen. Stat. § 25-3-309(a) (2017). This finding is supported by the record evidence, including numerous affidavits of representatives of CitiMortgage addressing the three factors set forth in § 25-3-309(a).

Respondents further maintain that CitiMortgage “failed to present sufficient evidence that it was the holder of the Note.” The attacks on the affidavits presented are tantamount to attacks on the credibility of the evidence, which we will not review. *See Sellers v. Morton*, 191 N.C. App. 75, 79, 661 S.E.2d 915, 920 (2008) (“When the trial court sits as a finder of fact, questions concerning the weight and credibility of the evidence are the province of the trial court.”).

We hold that this evidence was sufficient to support the trial court’s findings of fact, and that those findings of fact support the trial court’s conclusion of law that the Note was enforceable by CitiMortgage under N.C. Gen. Stat. § 25-3-309. We make this holding recognizing that the Respondents presented evidence showing that other parties previously had or may have an interest in this proceeding; however, we agree with the trial court’s finding that “Respondents have presented no credible evidence tending to show that any other entity is the holder of the debt or there is an actual controversy regarding CitiMortgage’s status as the holder.” The trial court’s findings are supported by competent

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evidence and are therefore conclusive “even though the evidence might sustain a finding to the contrary.” *Bass*, 366 N.C. at 467, 738 S.E.2d at 175.

The trial court properly concluded that CitiMortgage was the holder in due course of a valid debt and was entitled to proceed with the power of sale foreclosure under the terms of the parties’ deed of trust. Accordingly, we affirm the trial court.

AFFIRMED.

Judges STROUD and MURPHY concur.

IN THE MATTER OF I.P. AND Q.P., JR.

No. COA18-366

Filed 2 October 2018

Termination of Parental Rights—no-merit brief—no issues on appeal—independent review

Where the father’s counsel in a termination of parental rights case filed a no-merit brief pursuant to Rule of Appellate Procedure 3.1(d) and the father did not file a pro se brief, the Court of Appeals was bound by its decision in *In re L.V.*, 260 N.C. App. 201 (2018), to dismiss the appeal without conducting an independent review of the record, because the father failed to properly bring forth any pro se argument.

Judge ARROWOOD concurring in the result only in a separate opinion.

Chief Judge McGEE dissenting.

Appeal by Respondent-Father from orders entered 17 January 2018 by Judge P. Gwynett Hilburn in Pitt County District Court. Heard in the Court of Appeals 13 September 2018.

The Graham, Nuckolls, Conner, Law Firm, PLLC, by Timothy E. Heinle, for petitioner-appellee Pitt County Department of Social Services.

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Assistant Appellate Defender Joyce L. Terres, for respondent-appellant father.

Respondent-appellant father, pro se.

Administrative Office of the Courts, by Guardian Ad Litem Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

HUNTER, JR., Robert N., Judge.

Respondent-Father appeals from orders terminating his parental rights to his minor children, I.P. (“Ian”) and Q.P., Jr. (“Quentin”).¹ Respondent-Father’s counsel filed a no-merit brief, pursuant to North Carolina Rule of Appellate Procedure 3.1(d). Respondent-Father failed to properly bring forth any *pro se* argument. We dismiss.

I. Factual and Procedural Background

On 25 June 2014, the Pitt County Department of Social Services (“DSS”) obtained non-secure custody of Ian and Quentin and filed petitions alleging them to be neglected and dependent juveniles. The petition alleged the following narrative. On 11 February 2014, DSS received a child protective services (“CPS”) report alleging Ian, then four months old, tested positive for cocaine and marijuana. The juvenile’s mother (“mother”) tested positive for cocaine and admitted to using marijuana.² Mother refused drug treatment. On 16 June 2014, mother had no food in her home. Although mother received \$750 in food stamps per month, she sold her food stamps. Mother used “marijuana and cocaine with [Ian] in her arms and strapped to her chest[.]” Quentin ran around mother’s home, holding a butcher knife. Mother “pulled a knife” on another and refused to submit to a drug screen. Mother offered Ian and Quentin’s grandmother as a placement option, but CPS reported the grandmother also “ha[d] her own drug abuse issues[.]” DSS further alleged the following: (1) Ian and Quentin did not receive proper care, supervision or discipline; (2) they lived in an environment injurious to their welfare; and (3) mother was unable to provide for their care and supervision.

1. We use pseudonyms throughout the opinion for ease of reading and to protect the juveniles’ identities. N.C. R. App. P. 3.1(b) (2017).

2. Mother is not a party to this appeal. In the interest of brevity, this opinion omits most of the background relevant to mother.

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At the time DSS filed the petitions, Respondent-Father's whereabouts were unknown.³

On 7 August 2014, the trial court held an adjudication hearing, which Respondent-Father attended. On 29 August 2014, the court entered an adjudication order. The court concluded Ian and Quentin were neglected and dependent juveniles.⁴ Following a disposition hearing on 4 September 2014, the court entered an order on 8 October 2014. The court kept custody of Ian and Quentin with DSS and granted Respondent-Father visitation with the juveniles. The trial court further ordered Respondent-Father to do the following: (1) comply with the terms of his probation and not acquire new criminal charges; (2) complete parenting classes; (3) obtain and maintain stable employment; and (4) obtain and maintain stable housing.

On 29 January 2015, the trial court held a permanency planning review hearing. In an order entered 5 March 2015, the court found:

19. The Department has only had contact with the Respondent Father once since the initiation of this case. The Respondent Father is currently incarcerated. His release date is unknown.

20. Reunification efforts would not result in placement in the home within a reasonable period of time [and] would be futile and inconsistent with safety and the need for a safe permanent home for the following reasons: the Respondent Father has not been involved in the Juvenile[s'] case and has failed to show a lack [of] dedication to the Juveniles. He is currently incarcerated and his release date is unknown.

Consequently, the trial court ceased reunification efforts with Respondent-Father. The court allowed Respondent-Father's counsel to withdraw from representation, because Respondent-Father failed to stay in contact with counsel. The court set the permanent plan for Ian and Quentin as reunification with mother, with a concurrent plan of adoption.

3. At the termination hearing, a DSS social worker testified Respondent-Father "surface[d] . . . a month and a half later."

4. The trial court's adjudication order and subsequent orders prior to the filing of petitions to terminate parental rights also involved Ian and Quentin's siblings, but they are not parties to this appeal.

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The court held another review hearing on 28 January 2016.⁵ In an order entered 12 February 2016, the court found mother relapsed and used marijuana and cocaine. The court ceased reunification efforts with mother. The court changed the primary permanent plan to adoption, and the secondary plan to guardianship. The court held another review hearing on 10 November 2016. At the hearing, the trial court found paternity testing ruled Respondent-Father out as Ian's biological father.

On 5 December 2016, DSS filed a petition to terminate mother's parental rights to Ian. The same day, DSS filed a petition to terminate mother's and Respondent-Father's parental rights to Quentin.⁶ DSS alleged the following grounds for termination existed as to Quentin: (1) neglect; (2) failure to correct the conditions which led to Quentin's removal from his care; (3) failure to pay for Quentin's cost of care while Quentin was in DSS custody; (4) dependency; and (5) willful abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (6)-(7) (2017).

The trial court held a hearing on the petitions on 28 September 2017 and 7 December 2017.⁷ DSS called Kelli Clay, a social worker. Due to Respondent-Father's probation conditions, DSS set up a "strict visitation plan" for him. Respondent-Father did not comply with the visitation plan. Out of twenty-five opportunities for visitation, Respondent-Father attended thirteen. Respondent-Father last visited with the juveniles on 11 July 2016. Respondent-Father owed \$1,270.18 in arrears for child support for Quentin. Respondent-Father did give the juveniles a few gifts, "but nothing substantial[.]"

Although the court ordered Respondent-Father to not obtain any new criminal charges, authorities in North Carolina charged him for crimes "that involved communicating threats[.]" Additionally, Respondent-Father did not complete parenting classes. Although Respondent-Father told DSS he obtained employment and stable housing, he failed to provide any verification.

DSS moved to amend the petition to terminate parental rights to Ian to include allegations against Respondent-Father. DSS contended it learned Respondent-Father had been found to be the father of Ian in a

5. The court also held review hearings on 30 April 2015 and 16 July 2015.

6. Because paternity tests established Respondent-Father was not the biological father of Ian, DSS did not seek to terminate Respondent-Father's paternal rights to Ian.

7. The hearing was for the petitions to terminate mother's parental rights to Ian and Quentin and Respondent-Father's parental rights to Quentin.

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prior child-support hearing and that court ordered Respondent-Father to pay child support for Ian. Thus, Respondent-Father is Ian's legal father. With the consent of Respondent-Father's counsel, who joined in the motion, the court allowed the requested amendments so the allegations against Respondent-Father as to Ian were identical to those in the petition to terminate Respondent-Father's parental rights to Quentin.

Respondent-Father testified on his own behalf and largely narrated his testimony. From 2013 until the hearing, Respondent-Father was intermittently incarcerated. In February 2016, Respondent-Father returned to North Carolina. He began working at Cracker Barrel and moved into an apartment in Greenville. Respondent-Father "look[ed] for parenting classes to take, but . . . was unfortunate enough to not find any classes." Respondent-Father alleged DSS fought against him getting custody of Ian and Quentin.

On 17 January 2018, the trial court entered orders terminating Respondent-Father's parental rights to Ian and Quentin. The court found the following grounds for termination existed: (1) neglect; (2) failure to correct the conditions which led to the juveniles' removal from his care; (3) failure to pay for the juveniles' cost of care while they were in DSS custody; (4) dependency; and (5) willful abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (6)-(7). In an order entered 17 January 2018, the court found termination of Respondent-Father's parental rights was in the juveniles' best interests. On 30 January 2018, Respondent-Father filed timely notice of appeal.

II. Analysis

Appellate counsel for Respondent-Father filed a no-merit brief on Respondent-Father's behalf, in which counsel states she made a conscientious and thorough review of the record on appeal and concluded there is no issue of merit on which to base an argument for relief. Pursuant to North Carolina Rule of Appellate Procedure 3.1(d), counsel requests this Court conduct an independent examination of the case. N.C. R. App. P. 3.1(d) (2017). In accordance with Rule 3.1(d), counsel wrote a letter to Respondent-Father on 2 May 2018, advising him of counsel's inability to find error, her request for this Court to conduct an independent review of the record, and his right to file his own arguments directly with this Court. Counsel also avers she provided Respondent-Father with copies of all relevant documents so that he may file his own arguments with this Court.

In addition to seeking review pursuant to Rule 3.1(d), counsel directs this Court's attention to potential issues with the trial court's

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conclusions of law on the grounds of failure to correct the conditions which led to the juveniles' removal from his care, failure to pay for the juveniles' cost of care while they were placed in DSS custody, dependency, and willful abandonment. Counsel concedes, however, the trial court did not err in terminating Respondent-Father's parental rights on the ground of neglect. *See In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93-94 (2004) (citation omitted) ("Having concluded that at least one ground for termination of parental rights existed, we need not address the additional ground[s] . . . found by the trial court"). Counsel also concedes the trial court did not abuse its discretion in concluding termination of Respondent-Father's parental rights was in the juveniles' best interests.

On 9 May 2018, counsel filed a motion, requesting this Court extend Respondent-Father's time to file a *pro se* brief. In an order entered 11 May 2018, we granted this motion, ordering Respondent-Father to file his brief by 8 June 2018.

On 18 June 2018, Respondent-Father filed his *pro se* brief, arguing:

the trial court[']s fact finding was flawed because it was influenced by specious testimony & acts. I am not able to prove my case in chief at this exact moment as I do not have access to vital paperwork/documents nor the resources to support my argument. Currently, I am being detained at the address listed on criminal charges, with a trial date set within the next 90 days. I humbly request that this court suspend any final ruling for the next 120 days. That will give my criminal case time to have been heard & me to compile & obtain what[']s needed to support my argument.

Inasmuch as Respondent-Father's argument presents a request to hold his appeal in abeyance, we deny the request. Moreover, Respondent-Father's sole argument on appeal—the trial court's fact finding was flawed—is a bare assertion of error unsupported by citation to any record evidence or legal authority, and it is thus not properly before this Court. *In re C.D.A.W.*, 175 N.C. App. 680, 688, 625 S.E.2d 139, 144 (2006) (holding an issue on appeal was abandoned where it was "void of any discernible argument or citation as authority for such a claim"). *See also* N.C. R. App. P. 28(b)(6) (2017) ("Issues . . . in support of which no reason or argument is stated, will be taken as abandoned.").

Although Respondent-Father filed *pro se* arguments with this Court, his arguments are not properly before this Court because they are

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untimely and nothing more than unsupported allegations of error, as explained *supra*. Thus, “[n]o issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure.” *In re L.V.*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2018 WL 3232738 (N.C. Ct. App. July 3, 2018). Accordingly, we must dismiss Respondent-Father’s appeal. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”).

III. Conclusion

For the foregoing reasons, we dismiss Respondent-Father’s appeal.

DISMISSED.

Judge ARROWOOD concurs in result only in a separate opinion.

Chief Judge McGEE dissents in a separate opinion.

ARROWOOD, Judge, concurring in result only.

I concur in result only for the reasons discussed in my concurrence in *In the Matter of: L.E.M.*, ___ N.C. App. ___, ___ S.E.2d ___, (2018) (No. COA18-380), filed concurrently with this opinion.

McGEE, Chief Judge, dissenting.

I dissent for the reasons discussed in my dissenting opinion in *In re L.E.M.*, ___ N.C. App. ___, ___ S.E.2d ___, (2018) (No. COA-380), filed concurrently with this opinion.

IN RE L.E.M.

[261 N.C. App. 645 (2018)]

IN THE MATTER OF L.E.M.

No. COA18-380

Filed 2 October 2018

Termination of Parental Rights—no-merit brief—no issues on appeal—-independent review

Where the father's counsel in a termination of parental rights case filed a no-merit brief pursuant to Rule of Appellate Procedure 3.1(d) and the father did not file a pro se brief, the Court of Appeals was bound by its decision in *In re L.V.*, 260 N.C. App. 201 (2018), to dismiss the appeal without conducting an independent review of the record, because the father failed to argue or preserve any issues for review.

Judge ARROWOOD concurring in the result only in a separate opinion.

Chief Judge McGEE dissenting.

Appeal by Respondent-Father from order entered 5 January 2018 by Judge John K. Greenlee in Gaston County District Court. Heard in the Court of Appeals 23 August 2018.

Elizabeth Myrick Boone for petitioner-appellee Gaston County Department of Social Services.

Assistant Appellate Defender Annick Lenoir-Peek for respondent-appellant father.

Nelson Mullins Riley & Scarborough LLP, by Reed J. Hollander, for guardian ad litem.

HUNTER, JR., Robert N., Judge.

Respondent appeals from an order terminating his parental rights to his minor child, L.E.M. ("Landon").¹ Respondent's counsel filed a no-merit brief, pursuant to North Carolina Rule of Appellate Procedure 3.1(d). We dismiss.

1. We use pseudonyms throughout the opinion for ease of reading and to protect the juveniles' identities.

IN RE L.E.M.

[261 N.C. App. 645 (2018)]

I. Factual and Procedural Background

On 4 January 2016, the Gaston County Department of Social Services (“DSS”) obtained non-secure custody of Landon and his older sibling B.E.M. (“Brett”) and filed a petition alleging both to be neglected and dependent juveniles.² DSS alleged it was involved with the family since September 2015, due to allegations of substance abuse and medical neglect of Brett. Following a recent arrest, both parents³ were being held in the Gaston County Jail. DSS further alleged the following: (1) the children did not receive proper care, supervision, or discipline from their parents; (2) the children lived in an environment injurious to their welfare; and (3) the parents were unable to provide for the children’s care and supervision.

On 17 February 2016, Respondent entered into a mediation agreement with DSS, wherein he accepted Landon would be adjudicated as neglected and dependent, entered into a case plan with DSS, and agreed to work with DSS toward reunification with Landon. On 19 April 2016, the trial court entered an order adjudicating Landon as a neglected and dependent juvenile. The court continued custody of Landon with DSS. The court ordered Respondent comply with the terms of his mediated case plan, including: (1) obtain a substance abuse assessment, follow recommendations of the assessment, and submit to random drug screens; (2) obtain a mental health assessment and follow recommendations of the assessment; (3) attend the juveniles’ medical appointments; (4) obtain safe and appropriate housing; (5) obtain employment; and (6) complete a parenting class and utilize skills learned during visits with Landon.

In May and September 2016, the trial court conducted review and permanency planning hearings. The court established Landon’s primary permanent plan as reunification, with guardianship as the secondary plan.

On 29 November 2016, the court held another review and permanency planning hearing. In an order entered 28 March 2017, the trial court found Respondent failed to make sufficient progress on his case plan and was incarcerated in West Virginia. The court changed Landon’s primary permanent plan to adoption, with a secondary plan of reunification. In an order entered 11 April 2017, the court continued Landon’s primary permanent plan as adoption, but changed the secondary plan to guardianship.

2. Respondent is not the father of Brett, and Brett is not a party to this appeal.

3. The juveniles’ mother is not a party to this appeal.

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On 12 April 2017, DSS filed a petition to terminate Respondent's parental rights to Landon. DSS alleged grounds existed for termination of Respondent's parental rights based on: (1) neglect; (2) failure to correct the conditions that led to Landon's removal from his care; and (3) dependency. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(2), (6) (2017).

On 13 November 2017, the trial court held a termination of parental rights hearing. DSS called Respondent. Respondent entered into a case plan with DSS, following Landon's adjudication as a neglected and dependent juvenile. Pursuant to the plan, Respondent agreed to resolve substance abuse issues, attend counseling, attend parenting classes, and visit Landon. However, he failed to participate in a substance abuse assessment or complete any substance abuse treatment.

In June 2015, authorities in Harrison County arrested Respondent for a parole violation. On 1 August 2015, authorities "shipped" him to jail in West Virginia. In West Virginia, he did not complete any progress on his case plan, because "[t]hey don't provide that stuff in the West Virginia department."

While Respondent was incarcerated, Hannah Crawford, a DSS social worker regularly contacted Respondent. He wrote her one letter in December 2015. In his letter, he did not tell Crawford about the lack of resources available to him. Following his release in late May or early June 2017, the court and DSS refused to allow him to see Landon and Brett.⁴

DSS next called Hannah Crawford. From the time DSS took custody of Landon on 4 January 2016 to the date of the hearing, Crawford was the social worker assigned to Landon's case. Crawford asserted Respondent failed to make "significant progress" on his case plan, even prior to his incarceration on 1 June 2015. Respondent attended visitation with Landon but did not demonstrate "appropriate" parenting skills. Respondent failed to obtain a substance abuse assessment, engage in any substance abuse treatment, or obtain a mental health assessment. Respondent also did not complete parenting classes, obtain employment, or obtain safe housing. On 26 May 2016, a doctor performed a parental capacity evaluation, concluding Respondent possessed "rather marginal parenting capability."

Following another arrest in June 2016 and Respondent's incarceration until May 2017, Crawford "attempted" to maintain contact

4. DSS presented Respondent with a June 2017 court order, stating it would "reinstat[e] respondent father's visitation provided he is able to provide a clean drug screen."

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with Respondent. Respondent did not contact Crawford “regularly”, inquire about Landon’s placement, or send any “cards, gifts, letters” Respondent replied to Crawford only once, in December 2016, acknowledging the case plan Crawford sent to him and that he received her letters. In the letter, it seemed “along the line that he’d be able to complete parenting classes[.]”

Following his subsequent release in April 2017, Respondent called Crawford in May 2017.⁵ Crawford asked Respondent to meet with DSS to go over the case plan. DSS and Respondent met on 5 June 2017. Following the meeting, Respondent failed to attend a mental health assessment, failed to obtain a substance abuse assessment, did not comply with two drug screens, and tested positive for drugs.

Since 31 May 2016, Respondent did not write or call Crawford to ask about Landon or have any contact with Landon. As of the day of the hearing, Respondent failed to submit proof of stable employment or appropriate housing.

On 5 January 2018, the trial court entered an order terminating Respondent’s parental rights on the grounds of neglect and failure to make reasonable progress. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (2). The court concluded termination of Respondent’s parental rights was in Landon’s best interests. Respondent filed timely notice of appeal.

II. Analysis

Appellate counsel for Respondent filed a no-merit brief on Respondent’s behalf in which counsel states she made a conscientious and thorough review of the record on appeal and concluded there is no issue of merit on which to base an argument for relief. Pursuant to North Carolina Rule of Appellate Procedure 3.1(d), appellate counsel requests this Court conduct an independent examination of the case. N.C. R. App. P. 3.1(d) (2017). In accordance with Rule 3.1(d), counsel wrote a letter to Respondent on 26 April 2018, advising Respondent of counsel’s inability to find error, of counsel’s request for this Court to conduct an independent review of the record, and of Respondent’s right to file his own arguments directly with this Court. Counsel also avers she provided Respondent with copies of all relevant documents so that he may file his own arguments with this Court. Respondent did not file written arguments with this Court, and a reasonable time for him to have done so

5. The date of Respondent’s release is not clear from the testimony; however, the trial court found as fact the West Virginia Department of Corrections released Respondent in May 2017.

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has passed. Thus, “[n]o issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure.” *In re L.V.*, ___ N.C. App. ___, ___, ___ S.E.2d ___, 2018 WL 3232738 (N.C. Ct. App. July 3, 2018). Accordingly, we must dismiss Respondent’s appeal. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citation omitted) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”).

III. Conclusion

For the foregoing reasons, we dismiss Respondent’s appeal.

DISMISSED.

Judge ARROWOOD concurs in result only in separate opinion.

Chief Judge McGEE dissents in a separate opinion.

ARROWOOD, Judge, concurring in result only.

We are dismissing respondent’s appeal because we are bound by *In re L.V.*, 260 N.C. App. 201, 814 S.E.2d 928, 2018 WL 3232738 (N.C. Ct. App. July 3, 2018). I agree that *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989) requires our Court to follow *In re L.V.*, however, I concur in the result only because I believe *In re L.V.* erroneously altered the jurisprudence of cases arising under Rule 3.1 of the North Carolina Rules of Appellate Procedure. Furthermore, this change significantly impacts the constitutional rights of North Carolinians, such as the respondent in this case, whose fundamental right to a parental relationship with his child should only be terminated as contemplated by law. Therefore, I write separately to address this shift in our precedent.

The concept of a no-merit brief, also referred to as an *Anders* brief, comes from the United States Supreme Court’s decision in *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967). *Anders* held that an attorney representing a criminal defendant in a case the attorney finds without legal merit can request permission to withdraw as counsel for this reason, but the request must “be accompanied by a brief referring to anything in the record that might arguably support the appeal.” *Anders*, 386 U.S. at 744, 18 L. Ed. 2d at 498. “[T]he court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.” *Id.*

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Our Court initially denied extending *Anders* procedures to termination of parental rights cases. *See In re N.B.*, 183 N.C. App. 114, 117, 644 S.E.2d 22, 24 (2007) (citation omitted). However, the *In re N.B.* court “urge[d] our Supreme Court or the General Assembly to reconsider this issue[,]” noting that “permitting such review furthers the stated purposes of our juvenile code.” *Id.* at 117-19, 644 S.E.2d at 24-25. Thereafter, our Supreme Court adopted Rule 3.1(d) of the North Carolina Rules of Appellate Procedure, which states:

In an appeal taken pursuant to [N.C. Gen. Stat.] § 7B-1001, if, after a conscientious and thorough review of the record on appeal, appellate counsel concludes that the record contains no issue of merit on which to base an argument for relief and that the appeal would be frivolous, counsel may file a no-merit brief. In the brief, counsel shall identify any issues in the record on appeal that might arguably support the appeal and shall state why those issues lack merit or would not alter the ultimate result. Counsel shall provide the appellant with a copy of the no-merit brief, the transcript, the record on appeal, and any Rule 11(c) supplement or exhibits that have been filed with the appellate court. Counsel shall also advise the appellant in writing that the appellant has the option of filing a *pro se* brief within thirty days of the date of the filing of the no-merit brief and shall attach to the brief evidence of compliance with this subsection.

N.C.R. App. P. 3.1(d) (2018).

Rule 3.1(d) provides for the filing of “no-merit briefs” and allowing an *Anders*-like procedure for appeals taken pursuant to N.C. Gen. Stat. § 7B-1001, including from termination of parent rights orders. *See id.* A parent may file a *pro se* brief when counsel files a no-merit brief, but nothing in the rule appears to require a parent to file a *pro se* brief in order for our Court to review the appeal. *See id.* Indeed, our Court has consistently interpreted Rule 3.1(d) to require our Court to conduct an independent review in termination of parental rights cases in which counsel filed a no-merit brief and the respondent-parent did not file a *pro se* brief. *See, e.g., In re A.A.S.*, 258 N.C. App. 422, 425-26, 812 S.E.2d 875, 879 (2018); *In re M.S.*, 247 N.C. App. 89, 94, 785 S.E.2d 590, 594 (2016); *In re D.M.G.*, 235 N.C. App. 217, 763 S.E.2d 339, 2014 WL 3511008 at *1, slip op. at *3 (2014) (unpublished); *In re D.M.H.*, 234 N.C. App. 477, 762 S.E.2d 531, 2014 WL 2795916 at *1, slip op. at *2 (2014) (unpublished); *In re O.M.B.*, 204 N.C. App. 369, 696 S.E.2d 201, 2010 WL 2163793 at

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*1, slip op. at *3 (2010) (unpublished); *In re R.A.M.*, 228 N.C. App. 568, 749 S.E.2d 110, 2013 WL 4005847 at *1-2, slip op. at *3-6 (2013) (unpublished); *In re P.R.B., Jr., III*, 204 N.C. App. 595, 696 S.E.2d 925, 2010 WL 2367236 at *5, slip op. at *10-11 (2010) (unpublished); *In re S.N.W.*, 207 N.C. App. 377, 699 S.E.2d 685, 2010 WL 3860906 at *1-2, slip op. at *3-5 (2010) (unpublished).

In re L.V. disavowed this routine procedure, and signaled a significant shift in our jurisprudence of cases arising under Rule 3.1 of the North Carolina Rules of Appellate Procedure. In *In re L.V.*, our Court held for the first time that “[n]o issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure” when a respondent’s appellate counsel files a no-merit brief that complied with Rule 3.1(d) and respondent fails to “exercise her right under Rule 3.1(d) to file a *pro se* brief.” *Id.* at 202, 814 S.E.2d at 928-29, slip op. at *2. To support its decision, the *In re L.V.* court cites Judge Dillon’s recent concurrence in *State v. Velasquez-Cardenas*, 259 N.C. App. 211, 815 S.E.2d 9 (2018) (Dillon, J., concurring): “Rule 3.1(d) does *not* explicitly grant indigent parents the right to receive an *Anders*-type review of the record by our Court, which would allow our Court to consider issues not explicitly raised on appeal.” *Velasquez-Cardenas*, 259 N.C. App. at 227, 815 S.E.2d at 20 (*italics in original*). I note that a concurring opinion is not binding on our Court, and also that the cited quotation was dicta, and therefore not controlling authority. See *Trustees of Rowan Tech. College v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) (“Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby.”) (citations omitted). The *In re L.V.* court did not address our Court’s previous case law, which consistently conducted an *Anders* review of the record when appellate counsel complies with Rule 3.1(d), even if the appellant does not exercise her right under Rule 3.1(d) to file a *pro se* brief.

I believe that *In re L.V.*’s interpretation of Rule 3.1(d) affects parents’ interest in the accuracy and justice of a decision to terminate their parental rights, and is inconsistent with the purposes of our juvenile code. See *Little v. Little*, 127 N.C. App. 191, 192, 487 S.E.2d 823, 824 (1997) (“A parent’s interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one.”) (citation, quotation marks, and alteration omitted). Therefore, I believe *In re L.V.* is an anomaly in our case law that must be corrected to ensure that the fundamental right to a parental relationship is not terminated other than as permitted by law. However, I concur in the result only because *In re Civil Penalty* requires me to follow the divergent path that the Court has taken. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

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McGEE, Chief Judge, dissenting.

I respectfully dissent from the majority opinion's holding that this Court, pursuant to *In re L.V.*, __ N.C. App. __, 814 S.E.2d 928 (2018), must dismiss Respondent's Rule 3.1(d) appeal. I agree with the analysis of the *concurring* opinion, and adopt that analysis, excepting its ultimate conclusion that we are bound by *In re L.V.*, and must therefore dismiss Respondent's appeal. I agree with the concurring opinion that *In re L.V.* was not correctly decided. As noted by both the majority and concurring opinions, we would normally be bound by *In re L.V.*; however, I believe the holding in *In re L.V.* is contrary to settled law from prior opinions of this Court. Therefore, this Court in *In re L.V.* was without the authority to "overrule" the prior opinions of this Court, and those prior opinions remain controlling in the present matter.

As the concurring opinion notes, "our Court has consistently interpreted Rule 3.1(d) to require our Court to conduct an independent review in termination of parental rights cases in which counsel filed a no-merit brief and the respondent-parent did not file a *pro se* brief." I also agree that "*In re L.V.* is an anomaly in our case law[.]" Rule 3.1(d) does not require a parent to file a *pro se* brief.

Rule 3.1(d) states:

No-Merit Briefs. In an appeal taken pursuant to N.C.G.S. § 7B-1001, if, after a conscientious and thorough review of the record on appeal, appellate counsel concludes that the record contains no issue of merit on which to base an argument for relief and that the appeal would be frivolous, counsel may file a no-merit brief. In the brief, counsel shall identify any issues in the record on appeal that might arguably support the appeal and shall state why those issues lack merit or would not alter the ultimate result. Counsel shall provide the appellant with a copy of the no-merit brief, the transcript, the record on appeal, and any Rule 11(c) supplement or exhibits that have been filed with the appellate court. *Counsel shall also advise the appellant* in writing that the appellant *has the option* of filing a *pro se* brief within thirty days of the date of the filing of the no-merit brief and shall attach to the brief evidence of compliance with this subsection.

N.C. R. App. P. 3.1(d) (emphasis added).

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In *In re L.V.*, this Court dismissed Respondent's no-merit appeal based on the following reasoning:

Respondent appeals from orders terminating her parental rights to the minor children L.V. and A.V. On appeal, Respondent's appellate counsel filed a no-merit brief pursuant to Rule 3.1(d) stating that, after a conscientious and thorough review of the record on appeal, he has concluded that the record contains no issue of merit on which to base an argument for relief.¹ N.C. R. App. P. 3.1(d). Respondent's counsel complied with all requirements of Rule 3.1(d), and Respondent did not exercise her right under Rule 3.1(d) to file a *pro se* brief. No issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure.²

In re L.V., __ N.C. App. at __, 814 S.E.2d at 928-29 (footnotes in original).³

The majority opinion holds that we are bound by *In re L.V.* and must dismiss Respondent's appeal. However, this Court has continually conducted the *Anders*-type review provided for in Rule 3.1(d), absent any accompanying *pro se* briefs from the respondents, both before and after *In re L.V.* was filed on 3 July 2018.⁴ Rule 3.1(d) *requires* a respondent's counsel who appeals pursuant to Rule 3.1(d) to file an appellate brief, which must include issues identified by counsel "that might arguably support the appeal and [counsel] shall state [in the no-merit brief] why those issues lack merit or would not alter the ultimate result." N.C. R. App. P. 3.1(d). Though not explicitly stated in Rule 3.1(d), it seems clear that the purpose in allowing attorneys to file no-merit briefs is to allow a respondent's counsel to request review by this Court of the respondent's record for potential error even though *counsel* has not been able to identify any error *counsel* believes warrants relief on appeal. Pursuant to

1. "In accordance with Rule 3.1(d), appellate counsel provided Respondent with copies of the no-merit brief, trial transcript, and record on appeal and advised her of her right to file a brief with this Court *pro se* on 11 April 2018."

2. "Rule 3.1(d) does *not* explicitly grant indigent parents the right to receive an *Anders*-type review of the record by our Court, which would allow our Court to consider issues not explicitly raised on appeal.' *State v. Velasquez-Cardenas*, __ N.C. App. __, __, 815 S.E.2d 9, 20 (2018) (Dillon, J., concurring)."

3. I join the concurring opinion in pointing out that the sole "authority" cited by *In re L.V.* is *dicta* obtained from a concurring opinion in a criminal matter, devoid of precedential value. The holding of *In re L.V.* is therefore supported by no legal authority.

4. *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967).

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the reasoning implicit in *In re L.V.*, the actual no-merit brief required to be filed by a respondent's counsel *is itself unreviewable* – i.e. appellate counsel's request to this Court to conduct the review as argued in the no-merit brief does not constitute an issue preserved for appellate review. This Court considered the same reasoning in *Velasquez-Cardenas*, where we *rejected* the *dicta* now relied upon in *In re L.V.*:

In the present matter, the concurring opinion, relying on N.C. R. App. P. 28, argues that we should not address the *Anders* issue in this opinion because it was not first brought up and argued in Defendant's brief. *We believe the fact that Defendant's attorney filed an Anders brief is sufficient to raise the issue and present it for appellate review.*

Velasquez-Cardenas, __ N.C. App. at __, 815 S.E.2d at 18 (some emphasis added); *see also State v. Chance*, 347 N.C. 566, 568, 495 S.E.2d 355, 356 (1998) (Finding “no error” because “[i]n accordance with our duty under *Anders*, we have examined the record and the transcript of the trial. From this examination, we find the appeal to be wholly frivolous.”). Because the defendant in *Velasquez-Cardenas* did not have any constitutional right to *Anders* review, the question of whether an *Anders*-type brief preserved any issues for appellate review had to be decided. This Court rejected the reasoning of the concurring opinion, and held that the brief requesting *Anders*-type review did present appropriate issues for appellate review, Rule 28(b)(6) notwithstanding. *Id.* In *Velasquez-Cardenas* we also factored into our analysis that this Court had a long, uninterrupted history of conducting full *Anders*-type review from denials of motions requesting post-conviction DNA testing, and our authority to conduct that review had never before been questioned. *Id.* at __, 815 S.E.2d at 11–12. In part of the analysis, this Court also recognized that review pursuant to Rule 3.1(d) was an *Anders*-type review: “Our Supreme Court added a provision to our Rules of Appellate Procedure, effective for all cases appealed after 1 October 2009, allowing an *Anders*-like procedure for appeals taken pursuant to N.C. Gen. Stat. § 7B-1001, including from TPR orders. N.C. R. App. P. 3.1(d).” *Id.* at __, 815 S.E.2d at 16.

However, if we follow *In re L.V.*, upon a Rule 3.1(d) appeal, this Court will be limited to review of *only* those issues included in a respondent's *pro se* brief – should respondent chose to file one.⁵ Nothing prior to the adoption of Rule 3.1(d) prevented a respondent from filing a *pro*

5. As noted below, since the adoption of Rule 3.1(d) only a *single respondent* has chosen to file any sort of *pro se* response.

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se appeal. Therefore, assuming the holding in *In re L.V.* to be correct, I do not see how the adoption of Rule 3.1(d) has *materially* benefitted respondents, or expanded the scope of appellate review, in any manner.⁶

The majority opinion in this case holds, based upon *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted) (“[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court”), that we are bound by *In re L.V.* The concurring opinion agrees. I agree that *In re Civil Penalty* controls the outcome, but would reach a different result. In *In re Civil Penalty*, our Supreme Court reasoned and held as follows:

This Court has held that one panel of the Court of Appeals may not overrule the decision of another panel on the same question in the same case. The situation is different here since this case and *N.C. Private Protective Services Board v. Gray*, do not arise from the same facts. In *Virginia Carolina Builders*, however, we indicated that the Court will examine *the effect of the subsequent decision, rather than whether the term “overrule” was actually employed*. We conclude that the *effect* of the majority’s decision here was to overrule [a prior opinion of the Court of Appeals]. This it may not do. Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.

We hold . . . that a panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.

Id. at 384, 379 S.E.2d at 36–37 (citations omitted) (emphasis added).⁷ As this Court held in a recent opinion affirming the termination of a father’s parental rights: “To the extent that *J.C.* is in conflict with prior holdings of this Court, . . . we are bound by the prior holdings.” *In re O.D.S.*, —

6. Respondents perhaps receive some benefit by their attorney’s work in compiling and filing the record, and by performing some other ministerial actions.

7. The 2016 amendment of N.C. Gen. Stat. § 7A-16 created a procedure for *en banc* review by this Court of its own decisions, but *In re Civil Penalty* is still the law with respect to the decisions of three judge panels of this Court.

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N.C. App. __, __, 786 S.E.2d 410, 417, *disc. review denied*, 369 N.C. 43, 792 S.E.2d 504 (2016). “[P]recisely because of *In re Civil Penalty*, when there are conflicting lines of opinions from this Court, we generally look to our earliest relevant opinion in order to resolve the conflict.” *State v. Meadows*, __ N.C. App. __, __, 806 S.E.2d 682, 693 (2017), *disc. review allowed*, __ N.C. __, 812 S.E.2d 847 (2018).; *see also State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 134 (2004); *State v. Alonzo*, __ N.C. App. __, __, __ S.E.2d __, __, 2018 WL 3977546, *2 (2018) (this Court is bound to follow an earlier decision of this Court, not a later decision that is in conflict with the earlier decision); *Boyd v. Robeson Cty.*, 169 N.C. App. 460, 470 and 477, 621 S.E.2d 1, 7 and 12 (2005) (citation omitted) (certain of this Court’s “decisions . . . effectively overrule [a prior decision of this Court]. It is, however, axiomatic that an appellate panel may not interpret North Carolina law in a manner that overrules a decision reached by another panel in an earlier opinion.” Therefore, we held that the later opinion was without precedential effect.).

The change proposed by *In re L.V.* can only be adopted if this Court rejects nearly a decade of appellate practice and precedent set following the 2009 enactment of Rule 3.1(d) by our Supreme Court. I believe the “effect” of the holding in *In re L.V.* is to overrule the precedent set by the prior opinions of this Court, which it cannot do. *In re O.D.S.*, __ N.C. App. at __, 786 S.E.2d at 417. Since the enactment of Rule 3.1(d), I have been able to locate seventy-six opinions, published and unpublished, filed prior to *In re L.V.*, in which one or both respondent-parents’ counsel have sought review pursuant to the no-merit provisions of Rule 3.1(d). One of those opinions was dismissed because no proper notice of appeal was filed. *In re D.L.M.*, 208 N.C. App. 281, 702 S.E.2d 555, 2010 WL 5135556, *2–3 (2010) (unpublished). Of the remaining seventy-five opinions involving no-merit appeals, unsurprisingly, only three are published.⁸ *In re A.A.S.*, __ N.C. App. __, __, 812 S.E.2d 875, 879 (2018); *In re M.J.S.M.*, __ N.C. App. __, __, 810 S.E.2d 370, 374–75 (2018); and *In re M.S.*, 247 N.C. App. 89, 94, 785 S.E.2d 590, 593–94 (2016).

This Court conducted full *Anders*-type reviews pursuant to Rule 3.1(d) in all seventy-five appeals it decided prior to *In re L.V.* In only *one* out of the seventy-five appeals – *In re A.L.W.* – did the respondent-parent exercise “the option of filing a pro se brief” as allowed by Rule 3.1(d). N.C. R. App. P. 3.1(d); *In re A.L.W.*, __ N.C. App. __, 803 S.E.2d 665 (2017) (unpublished) (“Respondent-mother filed *pro se* arguments

8. By definition, no-merit appeals are likely to be decided without great difficulty, and are unlikely to include novel issues of law.

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with this Court challenging the trial court's decision to terminate her rights. Her *pro se* brief, however, contains no 'citations of the authorities upon which the appellant relies,' N.C. R. App. P. 28(b)(6), and provides no basis to disturb the trial court's orders."). Nonetheless, this Court in *In re A.L.W.* still conducted the full Rule 3.1(d) *Anders*-type review based upon the respondent's attorney's no-merit brief. *Id.* In the remaining seventy-four opinions, this Court conducted a full *Anders*-type no-merit review pursuant to Rule 3.1(d) even though *none* of the respondents in those appeals filed *pro se* briefs to accompany their attorneys' no-merit briefs.⁹ I cannot find any case prior to *In re L.V.* in which this Court indicated any necessity that a respondent-parent file a *pro se* brief in order to activate this Court's jurisdiction or authority to consider the no-merit brief filed by the respondent's attorney. *Following* the filing of *In re L.V.*, this Court has conducted full *Anders*-type review, absent any *pro se* filings from the respondents, in four out of the five appeals it has decided. Out of eighty opinions filed by this Court involving no-merit briefs, only two – *In re L.V.* and *In re A.S.*, __ N.C. App. __, __ S.E.2d __, 2018 WL 4201062 (2018) (unpublished) – have declined to conduct the *Anders*-type review requested in the no-merit briefs filed by the respondents' attorneys.

It is presumed that this Court acts correctly. This Court is required to dismiss an appeal, even *sua sponte*, whenever it is without jurisdiction or authority to act.¹⁰ This duty is not in any manner diminished when this Court decides not to publish an opinion. This Court impliedly holds that it has the jurisdiction and authority to act whenever it considers the merits of an appeal. Though this Court may, in certain circumstances, recognize that it has been acting without authority and correct that error,¹¹ it may not do so lightly, nor without citation to the earlier precedent that served to invalidate the later holdings. I believe this Court's three published opinions that predate *In re L.V.* – and which are in complete accord with *every one* of this Court's relevant unpublished opinions filed before *In re L.V.*, have thoroughly established the

9. Had the reasoning in *In re L.V.* been applied to all no-merit appeals since the adoption of Rule 3.1(d), this Court would still be waiting to conduct its *first* review of an appeal pursuant to Rule 3.1(d), because only one *pro se* "brief" has been filed since 2009, and that "brief" was not even considered due to Rule 28(b)(6) violations.

10. Unless it applies an authorized discretionary writ or rule to allow review.

11. If, for example, this Court determines that it has been operating in ignorance of contrary holdings of prior opinions of this Court, or of our Supreme Court, it must acknowledge and adhere to that prior binding precedent – in effect "correct course" and disavow the prior incorrect holdings. *In re O.D.S.*, __ N.C. App. at __, 786 S.E.2d at 417.

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appropriate requirements of Rule 3.1(d) – including the consequences of the failure of a respondent to file a *pro se* brief.

In a published opinion filed on 20 March 2018, this Court conducted the following review of the respondent-father's appeal:¹²

Counsel for Respondent-Father filed a no-merit brief on his behalf, pursuant to N.C. R. App. P. 3.1(d), stating “[t]he undersigned counsel has made a conscientious and thorough review of the [r]ecord on [a]ppeal . . . Counsel has concluded that there is no issue of merit on which to base an argument for relief and that this appeal would be frivolous.” *Counsel asks this Court to “[r]eview the case to determine whether counsel overlooked a valid issue that requires reversal.*” Additionally, counsel demonstrated that he advised Respondent-Father of his right to file written arguments with this Court and provided him with the information necessary to do so. *Respondent-Father failed to file his own written arguments.*

Consistent with *the requirements* of Rule 3.1(d), counsel directs our attention to two issues: (1) whether the trial court erred in concluding that grounds existed to terminate Respondent-Father's parental rights and (2) whether the trial court abused its discretion in determining that it was in the children's best interests to terminate Respondent-Father's parental rights. However, counsel acknowledges he cannot make a non-frivolous argument that no grounds existed sufficient to terminate Respondent-Father's parental rights or that it was not in the children's best interests to terminate his parental rights.

We do not find any possible error by the trial court. The 25 April 2017 order includes sufficient findings of fact, supported by clear, cogent, and convincing evidence to conclude that at least one statutory ground for termination existed under N.C.G.S. § 7B-1111(a)(1). Moreover, the trial court made appropriate findings on each of the relevant dispositional factors and did not abuse its discretion in assessing the children's best interests. Accordingly, we affirm the trial court's order as to the termination of Respondent-Father's parental rights.

12. Both the respondent-father and the respondent-mother appealed termination of their parental rights. Only the respondent-father's appeal was pursuant to Rule 3.1(d).

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In re A.A.S., __ N.C. App. at __, 812 S.E.2d at 879 (citations omitted) (emphasis added); *see also In re M.J.S.M.*, __ N.C. App. at __, 810 S.E.2d at 374–75; *In re M.S.*, 247 N.C. App. at 94, 785 S.E.2d at 593–94. I believe this Court’s prior published opinions – *In re A.A.S.*, *In re M.J.S.M.* and *In re M.S.* – constitute controlling precedent, and mandate that this Court conduct a full *Anders*-type review whenever a respondent’s attorney files a no-merit brief and complies with the requirements of Rule 3.1(d). *In re L.V.* could not have “overruled” these prior opinions. *In re O.D.S.*, __ N.C. App. at __, 786 S.E.2d at 417.

In the present case, as required by Rule 3.1(d), Respondent’s attorney compiled and filed the 279 page record; composed and filed a twenty-four page no-merit brief that “identif[ied] issues in the record on appeal that might arguably support the appeal and [] state[d] why those issues lack merit or would not alter the ultimate result[;]” provided notice to Respondent and provided Respondent with the required materials; and attached evidence of compliance with the requirements of Rule 3.1(d) to the no-merit brief. DSS and the child’s guardian *ad litem* also filed appellee briefs. Respondent did not avail himself of “the option of filing a pro se brief” as permitted by Rule 3.1(d).

Respondent’s attorney complied with the requirements of Rule 3.1(d) for requesting an *Anders*-type review of the no-merit brief by this Court. Because I believe we are bound by the precedent set in *In re M.S.*, and subsequently followed by *In re A.A.S.* and *In re M.J.S.M.*, I believe *In re Civil Penalty* and its progeny require that we disregard the conflicting holding in *In re L.V.*, and conduct the requested Rule 3.1(d) *Anders*-type review.

Upon conducting the appropriate review, I would agree with Respondent’s counsel and hold that the trial court’s findings of fact support its conclusions that grounds existed to terminate Respondent’s parental rights pursuant to N.C. Gen. Stat. §§ 7B-1111(a)(1) and 7B-1111(a)(2) (2017), and that termination of Respondent’s parental rights was in the best interest of the child. I would further agree that review of the record reveals no errors occurred at trial that would warrant reversal. I would therefore affirm.

LIPPARD v. DIAMOND HILL BAPTIST CHURCH

[261 N.C. App. 660 (2018)]

BARRY LIPPARD AND KIM LIPPARD, PLAINTIFFS

v.

DIAMOND HILL BAPTIST CHURCH, DEFENDANT

No. COA18-302

Filed 2 October 2018

**Churches and Religion—ecclesiastical matters—entanglement—
church membership**

Plaintiffs’ removal from a church’s membership was a core ecclesiastical matter, in which the trial court properly concluded it was barred from entangling the courts.

Appeal by plaintiffs from judgment entered 19 January 2018 by Judge Anna Mills Wagoner in Iredell County Superior Court. Heard in the Court of Appeals 20 September 2018.

Winthrop and Winthrop, by Samuel B. Winthrop, for plaintiff-appellants.

E. Bedford Cannon for defendant-appellee.

TYSON, Judge.

Barry and Kim Lippard (“Plaintiffs”) appeal from an order dismissing their lawsuit against Diamond Hill Baptist Church (“Defendant”). We affirm.

I. Background

Plaintiffs filed a complaint for declaratory judgment against Defendant on 8 December 2016, to seek a judicial declaration of whether they remained active members of Defendant-church. Plaintiffs alleged they had been members of the church for thirty-five years. In 2013, Plaintiffs filed a complaint against Defendant, the senior minister of the church, and the minister of music, alleging they had defamed Plaintiffs to the other members of the church community. *Lippard v. Holleman*, __ N.C. App. __, 789 S.E.2d 812, 2017 WL 1629377 at *1 (unpublished), *appeal dismissed*, 370 N.C. 70, 803 S.E.2d 625 (2017). While those claims were still active, Plaintiffs filed a second action with almost identical issues and facts in 2015. *Id.* at *2.

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Subsequent to the filing of the 2013 complaint, Defendant claimed a vote was taken and Plaintiffs were removed as members of the church. Plaintiffs assert no votes were ever taken, and Defendant did not comply with the church constitution and bylaws in attempting to remove Plaintiffs as members. Plaintiffs also claim they were never informed of their removal as members in writing, nor were they given an opportunity to address the church community concerning their removal.

In answer to an interrogatory from the 2015 complaint, a church member stated a vote had been taken during a meeting held on 22 December 2013, wherein the members unanimously voted to remove Plaintiffs from church membership. Plaintiffs sought documentation of the alleged vote.

Defendant filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and 12(b)(6) on 30 March 2017. After a hearing on Defendant's motion, the trial court filed a written order to dismiss Plaintiffs' claim. The court cited its lack of subject matter jurisdiction because Plaintiffs' status of membership in the church was a "core ecclesiastical matter." Plaintiffs timely appealed.

II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2017).

III. Issues

Plaintiffs assert their status of membership in the church is not a core ecclesiastical matter and argue the trial court erred by granting Defendant's motion to dismiss.

IV. Standard of Review

When considering a Rule 12(b)(1) motion to dismiss, a trial court "need not confine" its inquiry to the pleadings, but "may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing." *Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (1998) (citation omitted). "If the evaluation is confined to the pleadings, the court must accept the plaintiff's allegations as true, construing them most favorably to the plaintiff." *Id.*

"We review a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12 of the North Carolina Rules of Civil Procedure *de novo*." *Burgess v. Burgess*, 205 N.C. App. 325, 327, 698 S.E.2d 666, 668 (2010).

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V. Analysis

Courts should not and may not become entangled in purely ecclesiastical matters involving a church, but can resolve civil law matters which may arise from a church controversy. *Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. 324, 327, 605 S.E.2d 161, 163 (2004). Ecclesiastical matters include those

which concern[] doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful *laws and regulations for the government of membership, and the power of excluding from such associations those deemed unworthy of membership* by the legally constituted authorities of the church[.]

Id. (emphasis supplied) (citation omitted).

To determine whether an issue is an ecclesiastical matter, “[t]he dispositive question is whether resolution of the legal claim requires the court to interpret or weigh church doctrine.” *Privette*, 128 N.C. App. at 494, 495 S.E.2d at 398. If the inquiry does not involve such interpretation, then neutral principles of civil law may be applied to resolve the issue. *Id.*

This Court has previously held “[m]embership in a church is a core ecclesiastical matter.” *Tubiolo*, 167 N.C. App. at 328, 605 S.E.2d at 164. Plaintiffs point to a later section of *Tubiolo*, identifying church membership as a property interest, which gives the courts some jurisdiction over the issue. *Id.* at 329, 605 S.E.2d at 164. This Court noted the limits of this holding: “courts do have jurisdiction over the very narrow issue of whether the bylaws were properly adopted by the [church].” *Id.* at 329, 605 S.E.2d at 164.

Plaintiffs do not argue whether or not the bylaws were properly adopted. Instead, they assert the requirements of the bylaws were not followed by Defendant. Plaintiffs attached the relevant sections of the bylaws to their complaint:

Section V – Termination of Membership

Members shall be terminated in the following ways:

...

(3) Exclusion by action of the church

...

LIPPARD v. DIAMOND HILL BAPTIST CHURCH

[261 N.C. App. 660 (2018)]

Section VI – Discipline

. . .

Should some serious condition exist which would cause a member to be a liability to the general welfare of the church, the pastor and the deacons will take every reasonable measure to resolve the problem in accord with Matthew 18. If it becomes necessary for the church to take action to exclude a member, a three-fourths (3/4) secret vote of the members present is required; and the church may proceed to declare the person to be no longer in the membership of the church. A spirit of Christian kindness and forbearance shall pervade all such proceedings.

Plaintiffs argue no vote was taken, they were never provided written notice of their removal, nor were they provided an opportunity to address the other members of the church to discuss their removal. The bylaws specifically call for “a three-fourths (3/4) secret vote” and do not provide for or require prior notice, an opportunity for the affected member to be heard, or a written notification of removal. Plaintiffs admit they were informed of the vote to exclude and their subsequent removal.

Plaintiffs also assert “[t]hat at no time did [they] take any action to have themselves removed from church membership.” A determination of this issue would fall squarely within ecclesiastical matters beyond the jurisdiction of the courts. *See Azige v. Holy Trinity Ethiopian Orthodox Tewahdo Church*, __ N.C. App. __, __, 790 S.E.2d 570, 575 (2016) (“The courts cannot determine the ‘immoral behavior’ of plaintiffs for purposes of the bylaws nor can the courts evaluate whether a particular transaction serves the needs of the membership of this church without involvement in ecclesiastical matters.”). “[W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off.” *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139-40, 21 L. Ed. 69, 71 (1872).

VI. Conclusion

Plaintiff’s allegations center around ecclesiastical matters, specifically “the adoption and enforcement within a religious association of needful laws and regulations for the government of membership, and the power of excluding from such associations those deemed unworthy of membership by the legally constituted authorities of the church.” *Tubiolo*, 167 N.C. App. at 327, 605 S.E.2d at 163. We cannot apply neutral principles of law without delving into ecclesiastical matters to determine whether or not Plaintiffs were properly removed from the church

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membership. *See Harris v. Matthews*, 361 N.C. 265, 273, 643 S.E.2d 566, 571 (2007).

“When a party brings a proper complaint . . . the courts will inquire as whether the church tribunal acted within the scope of its authority and observed its own organic forms and rules. But when a party challenges church actions involving religious doctrine and practice, court intervention is constitutionally forbidden.” *Id.* at 274-75, 643 S.E.2d at 572 (citation and internal quotation marks omitted).

Civil courts cannot become entangled with deciding what action may or may not have justified Plaintiffs’ removal from church membership, and further inquiry by this Court into the matter is barred. *Id.*; *Bouldin*, 82 U.S. (15 Wall.) at 139-40 (“we cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off”).

The trial court properly granted Defendant’s motion to dismiss. The judgment appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Judges INMAN and BERGER concur.

STATE OF NORTH CAROLINA
v.
JOSHUA A. BICE, DEFENDANT

No. COA17-1188

Filed 2 October 2018

1. Evidence—written statement of third party—no objection—consent to admission

The admission of a written statement by a third party in defendant’s trial for multiple drug offenses did not amount to plain error where defendant elicited testimony about the statement on cross-examination of a State witness prior to its introduction, and did not object to and expressly consented to its admission.

2. Appeal and Error—preservation of issues—fatal variance between indictment and evidence—not raised at trial

Defendant failed to preserve for appellate review an argument that a fatal variance existed between his indictment for trafficking

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opium by possession and the evidence at trial because he did not raise this issue as a basis for his motion to dismiss in the trial court.

3. Criminal Law—jury instruction—drug trafficking—ultimate user exemption

Evidence at defendant's trial for drug trafficking was insufficient to support a jury instruction on an "ultimate user" exemption in the Controlled Substances Act, because defendant's written confession, corroborated by his trial testimony, stated that he possessed his father's oxycodone pills in order to sell them to pay his bills and that he had researched how much money to charge for them.

4. Constitutional Law—effective assistance of counsel—not ripe for review

Defendant's claim of ineffective assistance of counsel in his trial for multiple drug offenses was dismissed without prejudice to his right to raise his claims in a motion for appropriate relief.

Appeal by defendant from judgment entered 17 November 2016 by Judge Reuben F. Young in Wayne County Superior Court. Heard in the Court of Appeals 20 June 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Cathy Pope, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith III, for defendant.

BERGER, Judge.

On November 17, 2016, a Wayne County jury convicted Joshua A. Bice ("Defendant") of possession of marijuana and trafficking opium by possession. Defendant alleges (1) error in the trial court's admission of hearsay; (2) a fatal variance between Defendant's indictment for trafficking opium by possession and the State's evidence; (3) error in the trial court's failure to instruct the jury on the statutory ultimate user exemption; and (4) ineffective assistance of counsel. We find no error.

Factual and Procedural Background

On the evening of September 18, 2015, Goldsboro Police Officer Donnie Head ("Officer Head") and North Carolina Alcohol Law Enforcement Agent Brian White ("Agent White") were parked in an unmarked police car at a Kangaroo gas station in Goldsboro, North Carolina, where they observed a Ford pick-up truck parked at the gas

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pumps. Rather than pumping gas, the driver of the pick-up truck, later identified to be Jason Hyland (“Hyland”), remained in his vehicle until Defendant’s silver Honda pulled into the parking lot. Hyland immediately exited his vehicle and walked to Defendant’s parked car.

Officer Head testified at trial that when Hyland reached Defendant’s car, they “transfer[red] something between their hands.” Hyland immediately returned to his vehicle. Based upon their training and experience, Officer Head and Agent White believed they had witnessed a drug transaction and decided to investigate further. Officer Head approached Defendant while Agent White approached Hyland.

When Officer Head approached Defendant, he observed “[Defendant] sitting in the driver’s seat. There [were] no other occupants in the vehicle. [Defendant] was holding a pill bottle in his hand.” After Officer Head identified himself and informed Defendant why he was there, Officer Head witnessed Defendant “quickly hid[e] the pill bottle down between his leg[s].” At Officer Head’s direction, Defendant identified himself and handed Officer Head the pill bottle, which contained fifty-four oxycodone pills prescribed to Grover Bice.

After Officer Head asked Defendant to step out of his car, Defendant told him that the pills belonged to Defendant’s father, who was receiving cancer treatment. Officer Head then searched Defendant and found \$190.00 in cash in Defendant’s wallet and a clear bag of marijuana in the pocket of his pants. Defendant was placed under arrest and read his *Miranda* rights, which Defendant expressly waived by signing and initialing a written waiver.

When Defendant was interviewed, he admitted he went to the gas station to buy marijuana. Defendant also claimed the oxycodone pills belonged to his father, who often rode in Defendant’s car. Defendant signed and initialed each line of a written confession, which stated:

I made a mistake. I was trying to help my parents out because my dad has cancer. I was selling the pills to make money to pay bills. I don’t get a profit off it. I just started selling them today. I have never sold them before. I don’t sell any other drugs. It was stupid of me. He just got them filled today. There was 100 pills. My dad kept 5. I sold Jason Hyland 41 earlier today for \$250.00 cash. Tonight he was going to buy 12 pills for \$100 cash approximately. I looked on Google to see how much they sold on the street for. I saw they sold for \$5-\$15 each.

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Defendant was indicted for trafficking opium by possession, possession with intent to sell or deliver opium, and possession of marijuana. Prior to trial, the State dismissed the charge of possession with intent to sell or deliver opium.

At trial, Defendant testified that he had never seen the confession bearing his signature and initials. However, when asked to review the confession, Defendant admitted that he signed and initialed each line of the statement. Defendant also testified that he recognized the specific content of his *Miranda* rights waiver and remembered reviewing, signing, and initialing each line of this waiver during the same interrogation. Defendant also admitted that he understood “quite well” that he was “in a very serious situation” when he was being interrogated, and also acknowledged that he had conducted internet research of his father’s medication.

Officer Head testified that Defendant’s confession reflected an exact transcription of Defendant’s responses to Officer Head’s interview questions. Officer Head also testified that he read the statement to Defendant, and handed the statement to Defendant. Defendant then “read over the statement, he initialed each line, that this—these were his words and this was a correct statement, and then at the very end of it I had him draw a line from the bottom of his statement to the bottom of the page so I couldn’t write or change anything in this statement where he signed and put the date.” Officer Head also stated that he gave Defendant the opportunity to make any changes to the written confession, but Defendant did not “indicate he wanted to add anything, or change anything.”

Neither Agent White nor Hyland testified at trial. However, Officer Head testified that Agent White found several \$20.00 bills in Hyland’s possession, but no pills or other contraband. Because Agent White was not present at trial, Officer Head was allowed to read into evidence a hand-written statement that Hyland had given to Agent White. Defendant did not object to the admission of Hyland’s statement, which said: “I, Jason Hyland, met with [Defendant] at Bojangles’ in Princeton to buy oxycodone [and] an hour later at the Kangaroo on 70 where I was about to purchase more and the cops saw us about to do a hand-to-hand and approached us.” The statement was signed by Hyland; dated September 18, 2015, at 11:12 p.m.; and was corroborated by Defendant’s testimony that he had met with Hyland at Bojangles’ earlier on September 18, 2015 to purchase more than three grams of marijuana.

After the statement was read into evidence, the State offered a copy of Hyland’s hand-written statement into evidence. The trial court

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specifically asked if there were any objections to the admission of Hyland's statement, and Defendant replied that he had no objection to its admission.

Defendant was convicted of trafficking opium by possession and possession of marijuana. He was sentenced to seventy to ninety-three months in prison, fined \$50,000.00, and placed on probation upon his release from prison. Defendant timely appeals, alleging the trial court erred by admitting Hyland's hearsay statement, denying his motion to dismiss on fatal variance grounds, and by not instructing the jury on the statutory ultimate user exemption. Defendant also asserts he received ineffective assistance of counsel.

AnalysisI. Hearsay

[1] Defendant first challenges the trial court's admission of Hyland's written statement into evidence, arguing that it was inadmissible hearsay. Defendant concedes he failed to object to the admission of the statement, and thus, did not preserve this issue for review. Instead, Defendant requests this Court review the admission of Hyland's statement for plain error. We find that Defendant is not entitled to appellate review on this issue.

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). The Supreme Court of North Carolina "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996), *cert. denied*, 525 U.S. 952, 142 L. Ed. 2d 315 (1998).

Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation and quotation marks omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would

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have reached a different result.” *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

Here, Defendant has failed to demonstrate that any “judicial action” by the trial court amounted to error. N.C.R. App. P. 10(a)(4). Defendant not only failed to object to the entry of Hyland’s statement, but he also expressly consented to the admission of the same. Defendant now argues that the admission of Hyland’s statement was an error by the trial court.

When the State introduced Hyland’s written statement at trial, the following exchange took place:

THE COURT: All right. Any objection to State’s Exhibit No. 7?

[Defense Counsel:] No, sir, Judge.

THE COURT: All right. Then State’s Exhibit No. 7 is hereby admitted into evidence.

This action by defense counsel to consent to the admission of Hyland’s statement may have been the result of strategic decisions made by Defendant and trial counsel, or Hyland’s statement may have been admitted because of questionable performance by counsel. Whatever the reason, a trial court is not required to second guess every decision, action, or inaction by defense counsel. Imposing such a requirement on our trial courts is neither desirable nor workable.

While the trial court should “see that the essential rights of an accused are preserved, the judge should not interfere in the attorney-client relationship in the absence of such gross incompetence or faithlessness of counsel as should be apparent to the trial judge and thus call for action by him.” *State v. Blackwood*, 60 N.C. App. 150, 153, 298 S.E.2d 196, 199 (1982) (citation and quotation marks omitted). Even though Defendant has argued that his counsel’s assistance was deficient, he has not alleged his trial counsel was grossly incompetent or faithless in his duties, and the record does not reflect gross deficiencies.

In *State v. Lashley*, the defendant alleged on appeal, among other things, that the trial court erred in admitting certain evidence despite the lack of objection by a *pro se* defendant. This Court stated that *pro se* defendants were not wards or clients of the court, and they could not “expect the trial judge to relinquish his role as impartial arbiter in exchange for the dual capacity of judge and guardian angel of defendant.” *State v. Lashley*, 21 N.C. App. 83, 85, 203 S.E.2d 71, 72 (1974).

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Defendants who are represented by counsel are not entitled to greater protections by the trial court than those afforded to *pro se* defendants.

Thus, because Defendant not only failed to object but also expressly consented to the admission of Hyland's statement, we cannot conclude the trial court erred by permitting the admission of such evidence per both parties' agreement.

Even if Defendant could correctly assert the trial court somehow erred, "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2017). "Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001), *disc. review dismissed*, 355 N.C. 216, 560 S.E.2d 142 (2002).

Where a defendant "posed a question that incorporated inadmissible material [during cross-examination], [d]efendant is simply not entitled to seek appellate relief on the grounds that the challenged testimony should have been excluded." *State v. Dew*, 225 N.C. App. 750, 758, 738 S.E.2d 215, 221, *disc. review denied*, 366 N.C. 595, 743 S.E.2d 187 (2013). This is because "[s]tatements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." *State v. Global*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007) (citations omitted), *affirmed*, 362 N.C. 342, 661 S.E.2d 732 (2008).

Here, although neither Agent White nor Hyland were present to testify at trial, Officer Head read Hyland's statement into evidence and the written statement was admitted without objection and with Defendant's consent. However, the State did not elicit the introduction of Hyland's statement during Officer Head's direct examination. In fact, neither the State nor Officer Head referenced Hyland by name nor mentioned his statement during direct examination.

Rather, during Officer Head's cross examination, Defendant elicited the following testimony regarding Hyland and his statement:

[Defense Counsel:] Okay. And the other gentleman was released.

[Officer Head:] Yes.

[Defense Counsel:] Okay. Now, was he released there at the scene?

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[Officer Head:] He was.

[Defense Counsel:] He was? Well, if he was released at the scene, um . . . if he was released at the scene, how did the statement become or how did they—how was a statement obtained from him at 11:12 that evening . . . in this case?

[Officer Head:] The ALE agent, Special Agent White, took the statement on-scene, and then released him.

[Defense Counsel:] He took the statement on-scene?

[Officer Head:] Correct.

[Defense Counsel:] Okay. And where—did he handwrite it out or what?

[Officer Head:] I'm not sure, I was not—I didn't see him write the statement; I was dealing with [Defendant] while Special Agent White was dealing with [Hyland].

[Defense Counsel:] Okay. *So he got it—he obtained a statement from the other individual that a drug transaction didn't take place and released him at the scene.*

[Officer Head:] I can read that statement if you wish me to.

[Defense Counsel:] No, I just—I was just wondering where the statement came—did you see him do that with the other gentleman?

[Officer Head:] Special Agent White took the statement. I was not right there when the statement was being given, so I can't testify of who wrote the statement or.

[Defense Counsel:] Okay. . . .

(Emphasis added.)

Defendant's questions concerning the content of Hyland's statement opened the door to the State's subsequent questions concerning the statement and introduction of the written statement. In response to Defendant's questions on cross examination, the State then asked Officer Head to identify and read Hyland's statement to the jury for the first time during re-direct examination. The State then offered a copy of Hyland's written statement into evidence as State's Exhibit 7.

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Not only did Defendant open the door to the introduction of Hyland's statement, but, again, Defendant explicitly consented to its admission into evidence. Accordingly, we find no error in the introduction of Hyland's statement.

II. Fatal Variance

[2] Defendant next argues that the trial court erred in denying his motion to dismiss his trafficking opium by possession charge as there was a fatal variance between the allegations contained in the indictment and the evidence offered at trial. However, Defendant failed to properly preserve this argument for review because he raises this issue for the first time on appeal.

A fatal variance between the indictment and proof is properly raised by a motion for judgment as of nonsuit or a motion to dismiss, since there is not sufficient evidence to support the charge laid in the indictment. A motion to dismiss for a variance is in order when the prosecution fails to offer sufficient evidence the defendant committed the offense charged. A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged.

State v. Glenn, 221 N.C. App. 143, 147, 726 S.E.2d 185, 188 (2012) (*purgandum*¹).

"In order to preserve a fatal variance argument for appellate review, a defendant must specifically state at trial that a fatal variance is the basis for his motion to dismiss." *State v. Scaturro*, ___ N.C. App. ___, ___, 802 S.E.2d 500, 505 (citations omitted), *disc. review dismissed as moot*, 370 N.C. 217, 804 S.E.2d 530 (2017). For example, in *State v. Hooks*, this Court dismissed defendant's fatal variance argument because defendant "based his motion to dismiss solely on insufficiency of the evidence . . . [and] did not allege the existence of a fatal variance between the indictment and the jury instructions" at trial. *State v. Hooks*, 243 N.C. App. 435, 442, 777 S.E.2d 133, 139, *disc. review denied, cert. denied*, 368 N.C. 605, 780 S.E.2d 561 (2015).

1. Our shortening of the Latin phrase "*Lex purgandum est*." This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

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Here, a review of the trial transcript reveals that Defendant never alleged a fatal variance when he moved to dismiss his trafficking opium by possession charge at trial. Instead, as in *Hooks*, Defendant moved for dismissal based on insufficiency of the evidence rather than a fatal variance. Defendant has waived his right to appellate review of this issue, and it is dismissed.

III. Jury Instruction

[3] Defendant asserts that the trial court erred in failing to instruct the jury on an exemption to his trafficking opium by possession charge. More specifically, Defendant contends that he is exempt from prosecution for violating Section 90-95(h)(4) of North Carolina's Controlled Substances Act ("the Controlled Substances Act") because he is an "ultimate user" pursuant to Section 90-101(c) of the Controlled Substances Act. Defendant concedes that he did not request an instruction on the ultimate user exemption at trial nor did he object to the trial court's omission of this instruction. Defendant therefore requests for this Court to review for plain error. We find no plain error.

In order to establish plain error, Defendant "must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (*purgandum*).

Our Supreme Court has held "on numerous occasions that it is the duty of the trial court to instruct the jury on all of the substantive features of a case." *State v. Loftin*, 322 N.C. 375, 381, 368 S.E.2d 613, 617 (1998) (citations omitted). "All defenses arising from the evidence presented during the trial constitute substantive features of a case and therefore warrant the trial court's instruction thereon." *Id.* (citations omitted).

"Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). The trial court's duty to instruct the jury "arises notwithstanding the absence of a request by one of the parties for a particular instruction." *Loftin*, 322 N.C. at 381, 368 S.E.2d at 617 (citations omitted).

For a jury instruction to be required on a particular defense, there must be substantial evidence of each element of the defense when the evidence is viewed in the light most favorable to the defendant. Substantial evidence is evidence that a reasonable person would find

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sufficient to support a conclusion. Whether the evidence presented constitutes substantial evidence is a question of law.

State v. Hudgins, 167 N.C. App. 705, 709, 606 S.E.2d 443, 446 (2005) (*purgandum*).

Section 90-95 of the Controlled Substances Act “makes the possession, transportation[, or] delivery of a controlled substance a crime.” *State v. Beam*, 201 N.C. App. 643, 649, 688 S.E.2d 40, 44 (2010). Any person who possesses more than four but less than fourteen grams of opium can be found guilty of the Class F felony of trafficking opium by possession. N.C. Gen. Stat. § 90-95(h)(4)(a) (2017). The defendant “unlawfully possesses” opium if he or she knowingly possesses it with “both the power and intent to control the disposition or use of that substance.” *State v. Galaviz-Torres*, 368 N.C. 44, 50, 772 S.E.2d 434, 438 (2015).

However, Section 90-101(c) dictates that some individuals are deemed lawful possessors of certain controlled substances. N.C. Gen. Stat. § 90-101(c) (2017). One such individual is “[a]n ultimate user or a person in possession of any controlled substance pursuant to a lawful order of a practitioner.” N.C. Gen. Stat. § 90-101(c)(3). The Controlled Substances Act defines an “ultimate user” as “a person who lawfully possesses a controlled substance for his own use, or for the use of a member of his household.” N.C. Gen. Stat. § 90-87(27) (2017).

Defendant does not contest that he was found in possession of “54 dosage units of Oxycodone weighing 6.89 grams.” Rather, Defendant contends that the trial court erred in not instructing the jury *sua sponte* on the ultimate user exemption. However, we find that the record lacks substantial evidence by which a jury instruction on the ultimate user exemption would have been required.

The evidence tended to show that Defendant did not lawfully possess fifty-four of his father’s oxycodone pills solely for his father’s prescribed use, as required to fall within the ultimate user exemption. Rather, the record reflects overwhelming evidence demonstrating that Defendant possessed his father’s oxycodone for his own purpose of unlawfully selling his father’s pills.

While Defendant presented evidence that the oxycodone found in his possession was prescribed to his father, that Defendant would drive his father to and from appointments related to his care, and that Defendant lived with and cared for his father, no reasonable person

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could conclude that Defendant was in lawful possession of his father's oxycodone at the time of his arrest.

Defendant signed and initialed each line of a written confession in which Defendant admitted that he "was selling the pills to make money to pay bills . . . [and had] sold Jason Hyland 41 [pills] earlier [that day] for \$250.00 cash." Defendant's written confession also stated that Defendant "looked on Google to see how much money [the oxycodone pills] sold on the street for" and that Defendant was planning to sell twelve more pills to Hyland later that night. Defendant's written confession was corroborated by Defendant's trial testimony, in which Defendant conceded that he recently researched oxycodone.

Moreover, although Defendant testified that he had never seen his signed confession before trial, he later admitted under oath that he signed and initialed each line of his written confession. Defendant also testified that he recognized the specific content of his *Miranda* rights waiver and remembered reviewing, signing, and initialing each line of this waiver during the same interrogation. Defendant further admitted that he understood "quite well" that he was "in a very serious situation" when he was being interrogated.

Because Defendant failed to present substantial evidence that he possessed the fifty-four oxycodone pills solely for his father's lawful use, he was not entitled to an instruction under Section 90-87(27), even when the evidence is viewed in the light most favorable to Defendant. Thus, the trial court did not err as no instruction on the ultimate user exemption was required. Because the evidence did not support the instruction, Defendant cannot show plain error.

IV. Ineffective Assistance of Counsel

[4] Finally, Defendant asserts that he received ineffective assistance of counsel because his counsel failed to object and agreed to the admission of Hyland's statement and failed to request a jury instruction on the ultimate user exception. We decline to address this claim on direct appeal.

If "the record before this [c]ourt is not thoroughly developed regarding . . . counsel's reasonableness, or lack thereof, . . . [then] the record before us is insufficient to determine whether defendant received ineffective assistance of counsel." *State v. Todd*, 369 N.C. 707, 712, 799 S.E.2d 834, 838 (2017). Here, the record before us is insufficient to determine whether trial counsel was ineffective or whether there were reasonable, strategic reasons for counsel's actions. Accordingly, we dismiss

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Defendant's ineffective assistance of counsel claim without prejudice to his right to assert his claim in a motion for appropriate relief.

Conclusion

Accordingly, we find no error in the trial court's admission of Hyland's statement as there was no "judicial action" at issue where both parties consented to the entry of the statement. In addition, Defendant has waived appellate review of his fatal variance claim. Defendant was not entitled to an instruction on the ultimate user exemption, and the trial court was not required to provide an instruction to the jury on this issue *sua sponte*. Finally, we dismiss Defendant's ineffective assistance of counsel claim without prejudice.

NO ERROR IN PART; DISMISSED IN PART.

Judges BRYANT and TYSON concur.

STATE OF NORTH CAROLINA
v.
KEVIN DESHAUN DIXON, DEFENDANT

No. COA17-1333

Filed 2 October 2018

1. Appeal and Error—motions to suppress—no affidavits—waiver of appellate review

In a first-degree murder trial, defendant's failure to include supporting affidavits with several motions to suppress various documentary evidence as required by N.C.G.S. § 15A-977(a) constituted a waiver of his right to appellate review of any challenges to the admission of that evidence. Further, where some of the motions were not actually ruled upon by the trial court and defendant did not object to admission of the underlying evidence, defendant failed to preserve review of those motions for appeal.

2. Evidence—motions to suppress—oral findings of fact—sufficiency

In a first-degree murder trial, the trial court did not err by making oral findings of fact regarding multiple pretrial motions to suppress even though it had ordered the State to prepare written motions, which it failed to do, because there were no conflicts in the evidence

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requiring the court to make any findings of fact, much less written ones, and the detailed findings were sufficient to support the conclusions of law. While the trial court referred to its oral findings as “sketches” that could be supplemented with proposed findings offered by the parties, nothing in the record suggested the judge had not made up his mind or intended to enter a written order contrary to the facts found and conclusions already reached.

3. Evidence—character—other crimes, wrongs, or acts—photographs—guns—hand gestures

The trial court did not abuse its discretion by admitting photographs obtained from defendant’s phone showing guns and showing defendant making certain hand gestures. Gun ownership is constitutionally protected and not indicative of bad character, and the hand gestures did not indicate gang affiliation despite defendant’s argument otherwise. In any event, the trial court instructed the State not to ask any questions about signs or gang affiliation based on the photo of the hand gestures.

4. Evidence—relevance—photographs—guns—location of shooting

The trial court did not abuse its discretion by admitting photographs showing guns and showing defendant making certain hand gestures, because the photographs were obtained from defendant’s phone, showed he had access to firearms, and depicted him at nearly the same location where the shooting occurred, making them relevant to defendant’s charges of felony murder and discharging a firearm into an occupied vehicle.

5. Identification of Defendants—in-court identification—findings and conclusions—sufficiency

The trial court did not err in admitting a witness’s in-court identification of defendant as the perpetrator of her fiancé’s murder because there was no conflict in the evidence requiring express factual findings on the alleged absence of a completed witness confidence statement at a photo lineup or the witness’s inability to choose between a photo of defendant and that of another man in the photo lineup, nor was there any evidence that the witness heard defendant’s name prior to being shown the photo lineup. The court properly concluded the evidence was relevant, admissible, and sufficient to go to the jury for a credibility determination.

Appeal by Defendant from Judgments entered 25 May 2017 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 16 May 2018.

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Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc Bernstein, for the State.

Marilyn G. Ozer for Defendant-Appellant.

INMAN, Judge.

Defendant Kevin Deshaun Dixon (“Defendant”) appeals from judgments entered following a jury verdict finding him guilty of discharging a firearm into an occupied vehicle in operation inflicting serious injury, felony murder, and possession of marijuana with the intent to sell. Defendant argues that the trial court erred in: (1) failing to enter written orders on several motions to suppress; (2) admitting into evidence inadmissible and unduly prejudicial photographs; and (3) permitting the victim’s fiancé, an eye witness, to identify Defendant in court. After careful review, we hold that Defendant has failed to demonstrate error.

I. FACTUAL AND PROCEDURAL HISTORY

On 26 November 2014, Maria Monje (“Monje”) and her fiancé Andres Alberto Martinez Trochez (“Martinez Trochez”) were driving through a neighborhood in Concord, North Carolina, looking to buy marijuana. Monje was driving the car, and Martinez Trochez was in the front passenger seat. As they were searching for a dealer, the two spotted a group of five to eight men standing by a silver Ford Mustang with a black racing stripe. One of the men waved and shouted at Monje and Martinez Trochez, beckoning them to pull over. They did, and the man approached the passenger side of their vehicle. The man asked to borrow Martinez Trochez’s cellphone; Martinez Trochez asked if the man had any marijuana. At this point, the man opened Martinez Trochez’s car door, pulled a small black gun out from under his shirt, held it to Martinez Trochez’s chest, and demanded money. While Monje searched the backseat for cash, the man shot Martinez Trochez. Seeing her fiancé had been shot, Monje immediately took control of the vehicle and drove away from the men gathered by the Mustang. As she was fleeing, at least two more shots were fired at her car by another man, shattering a rear passenger window.

Monje drove to a nearby police station, where officers attempted to save Martinez Trochez’s life. EMS arrived a short time later and pronounced Martinez Trochez dead. Monje described for police the location of the shooting and the silver Mustang the shooters were congregated around when she and Martinez Trochez had pulled over.

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Law enforcement immediately broadcast the description of the Mustang and began searching for the vehicle in the area of the shooting. Detective Patrick Merritt (“Detective Merritt”) drove Monje to the scene of the crime while the search for the Mustang was underway. While Monje and Detective Merritt were en route, another officer located a silver Mustang with a black racing stripe on a road a few dozen yards away from the crime scene. The officer ran the license plate and discovered the Mustang was registered to Defendant.

Meanwhile, at the crime scene with Detective Merritt, Monje identified Charles Mann (“Mann”) as one of the men present at the shooting. The detective then drove Monje to the location of the Mustang, where she positively identified the vehicle as the one from the crime scene. Police also searched Monje’s vehicle, discovering shell casings and bullets matching a .45 caliber gun.

In the course of the investigation into Martinez Trochez’s homicide, investigators asked Monje to review a photographic line-up of five men. Monje identified two men, one of whom was Defendant, as the possible shooter. Monje’s tentative identification, combined with Defendant’s ownership of the Mustang, led police to focus on Defendant as their prime suspect.

Six days after the shooting, on 2 December 2014, warrants for Defendant’s arrest were issued. He was arrested the following day and indicted on 15 December 2014.

While Defendant was incarcerated pending trial, a sheriff’s deputy at the Cabarrus County detention center found a “kite,” or a letter passed between inmates, bearing Defendant’s initials on the floor outside the cluster of cells housing him. The kite discussed in detail Defendant’s case, mentioned Mann as the State’s best evidence against Defendant, and asserted that Mann needed to keep quiet, as he was Defendant’s alibi. Defendant later asked the sheriff’s deputy what happened to the kite, as “he had written some shit on it that he shouldn’t have.”

Police were also provided with a second letter found by a cleaning crew that had worked in the home where Defendant’s Mustang was registered (the “Cleaning Crew Letter”). That letter, addressed to Defendant’s brother, discussed in detail the evidence the State had collected showing Defendant’s guilt, and mentioned that Mann’s testimony would be detrimental to his defense. The letter also stated that Defendant would be convicted if Monje and Mann testified. The letter provided names and contact information of people who could be paid to prevent those two witnesses from testifying.

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Other evidence collected by investigators included a cell phone taken from Defendant. The phone contained two photographs of firearms (the “Gun Photos”), including one attached to a message sent from Defendant’s phone saying “I stay wit dem irons,” referring to the guns. A third photograph recovered from the phone showed Defendant and another man leaning against the hood of a silver Mustang with a black racing stripe on the street where Martinez Trochez was shot (the “Mustang Photo”). Both men in the photo are displaying the hand sign for the number “4” with their left hands, while the man on the right is displaying a closed right hand with his middle finger extended.

Defendant filed several pre-trial motions to suppress the above evidence, including: (1) Monje’s identification of Defendant in the photo line-up (the “Line-Up Motion”); (2) Monje’s in-court identification of Defendant (the “ID Motion”); (3) the kite (the “Kite Motion”); (4) Monje’s identification and descriptions of the silver Mustang (the “Mustang Motions”); and (5) the photographs, text messages, and location data retrieved from Defendant’s cell phone (the “Cell Phone Motion”).¹ With one exception, the trial court rendered oral orders denying these motions; however, the trial court entered no written orders. The judge at various points described his oral findings and conclusions as “sketches” of those he instructed the prosecutor to include in a proposed written order, and he suggested that the parties offer additional proposed findings of fact for him to consider. But nothing in the record suggests that the findings and conclusions the judge recited from the bench were not, in fact, the trial court’s actual findings and conclusions from the evidence and applicable law.

During trial, when the State sought to introduce the Gun and Mustang Photos, Defendant objected, asserting that the photos were inadmissible under Rules 402, 403, and 404 of our Rules of Evidence. Defendant’s counsel argued that the Gun Photos were inadmissible because they did not match Monje’s description of the murder weapon and were otherwise inadmissible character evidence prohibited by Rule 404(a) of the North Carolina Rules of Evidence. Defendant’s counsel argued that the Mustang Photo was inadmissible because the hand gestures by the men in the photograph could be construed as gang signs by the jury and therefore constituted inadmissible character evidence prohibited by Rule 404(b). The trial court overruled Defendant’s objections but instructed the State not to ask any witness the meaning of the hand

1. The Cell Phone Motion argued only that the cell phone was unlawfully seized from Defendant. It did not argue that the phone or files found thereon were irrelevant, prejudicial, or otherwise inadmissible under our Rules of Evidence.

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gestures in the Mustang Photo; the trial judge announced his ruling from the bench but entered no written order.

On 25 May 2017, after two days of deliberation, the jury returned guilty verdicts on the charges of first-degree felony murder, discharging a firearm into an occupied vehicle while in operation inflicting serious injury, and possession with the intent to sell marijuana. The jury found Defendant not guilty of attempted robbery with a firearm.

The trial court arrested judgment on the discharging a firearm charge and sentenced Defendant to life imprisonment without parole for first-degree felony murder. The trial court also sentenced Defendant to a minimum six months and maximum seventeen months imprisonment for possession of marijuana with the intent to sell, which was suspended for 24 months of supervised probation. Defendant gave notice of appeal in open court.

II. ANALYSIS

Defendant presents three arguments on appeal: (1) the trial court committed reversible error in failing to enter written orders on the various motions to suppress; (2) the trial court erred in admitting the Mustang and Gun Photos; and (3) the trial court impermissibly permitted Monje to provide an in-court identification of Defendant. We address each argument in turn below, and hold that the trial court did not commit error.

a. Suppression Motions

[1] At the outset of this analysis, we note that Defendant's Kite, Cleaning Crew Letter, and Mustang Motions were not submitted to the trial court with supporting affidavits as required by N.C. Gen. Stat. § 15A-977(a). Defendant's failure to file affidavits with these motions is "a waiver on appeal of the right to contest the admission of evidence on either statutory or constitutional grounds." *State v. McQueen*, 324 N.C. 118, 128, 377 S.E.2d 38, 44 (1989). We therefore decline to review the trial court's orders on those motions and dismiss this portion of Defendant's appeal. *See State v. Holloway*, 311 N.C. 573, 577, 319 S.E.2d 261, 264 (1984) (dismissing an argument on appeal for this reason). Furthermore, it does not appear from the record that the trial court ruled on the Mustang Motions, nor does it appear that Defendant objected to the evidence encompassed by those motions when introduced at trial. Defendant also does not argue plain error. As a result, Defendant has failed to preserve review of the Mustang Motions on appeal. *State v. Oglesby*, 361 N.C. 550, 554-55, 648 S.E.2d 819, 821 (2007).

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[2] When reviewing the failure of a trial court to enter a written order on a motion to suppress, we look first to whether there exists a material conflict in the evidence requiring a finding of fact. *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015). “When there is no conflict in the evidence, the trial court’s findings can be inferred from its decision[,]” and findings of fact are not required. *Id.* at 312, 776 S.E.2d at 674 (citation omitted). “[O]ur cases require findings of fact only when there is a material conflict in the evidence and allow the trial court to make these findings either orally or in writing.” *Id.* at 312, 776 S.E.2d at 674.

Regardless of whether findings of fact are required, “it is still the trial court’s responsibility to make the conclusions of law . . . [and] failure to make any conclusions of law in the record [is] error.” *State v. McFarland*, 234 N.C. App. 274, 284, 758 S.E.2d 457, 465 (2014). Such conclusions “require[] ‘the exercise of judgment’ in making a determination, ‘or application of legal principles’ to the facts found.” *Id.* at 284, 758 S.E.2d at 465 (quoting *Sheffer v. Rardin*, 208 N.C. App. 620, 624, 704 S.E.2d 32, 35 (2010)).

Defendant argues that oral findings and conclusions made by the trial court from the bench are insufficient because the trial judge expressly ordered the State to prepare written orders on the motions and the State failed to do so. We disagree. If a written order is not required and an oral order may be sufficient in certain circumstances, *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674, the failure to go above and beyond that which is required by law does not render an otherwise lawful order erroneous. In other words, a minimally sufficient order is still exactly that—sufficient—even if more was ordered or requested by the trial court. Given this standard, the trial court committed reversible error only if: (1) there are conflicts in the evidence that the trial court failed to resolve either orally or in writing, through an explicit factual finding, *id.* at 312, 776 S.E.2d at 674; or (2) the trial court failed to make the necessary conclusions of law on the record. *McFarland*, 234 N.C. App. at 284, 758 S.E.2d at 465.

Neither the trial transcript nor the court’s oral order on the Photo Line-Up Motion noted any conflicts in the evidence, and Defendant points to none on appeal.² On this record, the trial court was not required to

2. Defendant pointed to no conflicts concerning the Photo Line-Up Motion in his principal brief, and identified evidentiary conflicts in his reply brief only in regard to the ID Motion.

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make findings orally or in writing.³ *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674. Nonetheless, the trial court made detailed findings of fact supporting its ruling. The trial court concluded as a matter of law that the evidence challenged in the Photo Line-Up Motion was relevant and more probative than prejudicial “after considering all the information before the Court[,]” and that “[t]he line-up was not unduly suggestive as alleged in the motion.” Because the trial court’s conclusions were supported by its factual findings and those findings were supported by the evidence presented, we hold that Defendant has failed to demonstrate reversible error. *Cf., e.g., State v. Faulk*, ___ N.C. App. ___, ___, 807 S.E.2d 623, 628-31 (holding reversible error occurred when the trial court denied a motion to suppress without making a single conclusion of law, applying the law to any facts, or disclosing the rationale for the court’s decision); *McFarland*, 234 N.C. App. at 284, 758 S.E.2d at 464-65 (holding the trial court failed to make necessary conclusions of law when it merely recited legal principles rather than drawing legal conclusions by applying those principles to the facts).

The trial court also recited its factual findings in detail when ruling on the ID Motion. Despite these findings, Defendant contends that material conflicts in the evidence were not resolved in the oral order. Specifically, Defendant asserts that Monje’s inability to describe Defendant in detail in a written statement to police or to identify Defendant conclusively in the photo line-up constituted material conflicts in the evidence, insofar as they “materially conflict with Ms. Monje’s claim on direct-examination that she had 100% confidence that she could identify [Defendant] on the day of the shooting.” We disagree.

“[A] material conflict in the evidence . . . [is] one that potentially affects the outcome of the suppression motion.” *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674. However, the only issues raised by Defendant’s evidence point to the reliability of Monje’s in-court identification, which was not a question for the trial court:

[A]n identification of the perpetrator of a crime is not inadmissible because the witness is not absolutely certain of the identification, so long as the witness had a reasonable possibility of observation sufficient to permit subsequent identification. Such uncertainty goes to the credibility and weight of the testimony, and it is well established that the

3. For example, the evidence is uncontroverted that Monje did not execute a witness confidence statement as part of her photo line-up. Because there was no conflict here, no finding as to that fact was required. *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674.

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credibility, probative force, and weight of the testimony are matters for the jury.

State v. Moses, 350 N.C. 741, 767, 517 S.E.2d 853, 869 (1999) (citations, quotation marks, and original alterations omitted). Because the evidence presented, including that pointed to by Defendant,⁴ did not raise a material conflict for the trial court to resolve in the suppression hearing, it was not required to make factual findings on the record. *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674.

The trial court concluded that the evidence subject to the ID Motion was relevant and passed the balancing test of Rule 403 “after considering all the information before the Court at this time.” Because these conclusions were drawn following a recitation of the facts and were based on the findings and evidence, the trial court properly “rendered a legal decision, in the first instance,” as to the relevance and admissibility of the evidence at issue. *State v. Baskins*, ___ N.C. App. ___, ___, 786 S.E.2d 94, 99 (2016) (internal citation and quotation marks omitted). The trial court expressly reached its conclusions by considering the facts and applying the relevant rules of evidence to those facts and therefore did not err in denying the ID Motion. *Cf. id.* at ___, 786 S.E.2d at 99 (holding a “conclusion” was not in actuality a conclusion of law where it consisted of a simple statement of law that detention of a motorist for probable cause does not violate the Fourth Amendment followed by a separate statement that the detention in the case was justified).

For the same reason, we also affirm the trial court’s ruling on the Statement Motions, which concerned pre-arrest and post-arrest interviews of Defendant by police. Again, the record discloses no conflicting evidence requiring findings of fact, and Defendant points to none on appeal. The trial court still made oral findings of fact, although it was not required to do so. *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674. Specifically, the trial court made detailed, numbered findings of fact

4. At oral argument, Defendant’s appellate counsel raised potential evidentiary conflicts concerning where Monje said the shooting occurred, why Monje had stopped there, and what interactions Defendant had with the victim at the stop. None of these conflicts was identified in Defendant’s appellat brief, or in his reply brief. Assuming *arguendo* that Defendant’s argument as to these conflicts are not waived, they do not “potentially affect[] the outcome of the suppression motion,” and were therefore not material conflicts requiring resolution. *Bartlett*, 368 N.C. at 312, 776, S.E.2d at 674. Indeed, Defendant’s counsel made a conclusory argument concerning this evidence and did not identify how resolution of these conflicts could have potentially affected the trial court’s order on the ID Motion. Defendant’s counsel instead argued only that it affected Monje’s credibility, which is a question for the jury. *Moses*, 350 N.C. at 767, 517 S.E.2d at 869.

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concerning the pre-arrest interview, namely that: (1) Defendant met with police; (2) police informed him he was not under arrest and free to leave; (3) Defendant chose not to leave, had his cell phone available to him, and was left alone in the interview room on several occasions; and (4) Defendant's statements in the interview were reduced to writing but never signed by him. From these findings, the trial court concluded that "[D]efendant voluntarily and intelligently and willingly participated in the interview[,]" that he "was not under arrest[,]" and, "under the totality of the circumstances, [police] were not required to read [D]efendant his *Miranda* rights during this noncustodial interview."

The trial court also rendered oral findings of fact concerning the post-arrest interview, namely that: (1) Defendant was represented by counsel at the time; (2) Defendant requested the interview with police; and (3) Defendant's *Miranda* rights were explained to him and he signed a written waiver of those rights. From these findings, the trial court concluded that "[D]efendant voluntarily—knowingly, voluntarily and willingly waived his *Miranda* rights and his rights to have counsel present and provided a statement to the officers which was reduced to writing[,]" and "[D]efendant's statement should not be excluded as it was made knowingly, voluntarily and willingly after waiving all his constitutional rights related thereto."⁵ In denying Defendant's Statement Motions, the trial court made detailed findings of fact concerning the two interviews, made conclusions of law that applied the relevant legal principles to those findings, and explained its rationale. The trial court did not commit reversible error in failing to enter a written order on these motions.

The record reflects that no conflicting evidence was presented in the hearing regarding Defendant's Cell Phone Motion, and Defendant points to none. So the trial court was not required to make any findings of fact. *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674. But the trial court made findings anyway, and also made the necessary conclusions of law to deny the motion. The trial court found, among other things, that "[D]efendant handed his phone to [a detective]" and "provided the pass code to the detective[;]" when the detective told Defendant he needed to search it for evidence, "[D]efendant complained about the inconvenience of [police] having his phone and that he needed it but never demanded that it be returned." From these findings, the trial court concluded that

5. See, e.g., *State v. Jordan*, 216 N.C. App. 112, 120, 716 S.E.2d 242, 247 n 2 (2011) (noting that whether waiver of *Miranda* rights was intelligently, voluntarily, and knowingly made is a conclusion of law).

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“[D]efendant voluntarily provided his phone to the police or to law enforcement[,]” and denied the motion. The trial court provided the necessary rationale for its ruling, including a conclusion from the factual findings that Defendant voluntarily provided police with access to his cell phone.

The trial court also made findings that, at the time Defendant handed his phone to the police, Monje had identified Defendant as a possible suspect, she had identified his Mustang as being present at the crime scene, and Defendant had already made statements to police that he was near the shooting when it occurred. The trial court then made the conclusions of law from these factual findings that “law enforcement had probable cause to seize it *based on the allegations known to them at the time concerning the shooting*[.] . . . that it’s reasonable to believe that the phone may contain evidence related to the alleged crime and that it would be proper to preserve it for evidentiary purposes[.]” and “that there was probable cause sufficient to search the phone . . .” (emphasis added). *Cf. Baskins*, ___ N.C. App. at ___, 786 S.E.2d at 99. In sum, the trial court provided the required rationale for its ruling, found sufficient facts, and applied the law to those findings in rendering conclusions of law.⁶ As a result, Defendant’s argument as to this motion is overruled.

The trial judge referred to his oral findings and conclusions as “sketch[es] of what [he] would like to include” in any written orders and would have “be[en] happy to consider any proposed findings” offered by the parties. However, nothing in the transcript indicates that the judge had not made up his mind on the findings and conclusions that were rendered aloud; rather, it appears the trial judge was merely giving counsel an opportunity to submit proposed findings and conclusions consistent with those recited orally, as the judge “preserve[d] the right to clarify” his findings and conclusions once proposed written orders were submitted. “A trial court’s ruling on an evidentiary point will be presumed to be correct unless the complaining party can demonstrate that the particular ruling was in fact incorrect,” *State v. Herring*, 322 N.C. 733, 749, 370 S.E.2d 363, 373 (1988) (citation omitted), and “[t]here is a presumption of regularity in the trial. . . . An appellate court is not required to, and

6. Defendant notes that several of the trial court’s rulings requested the State to draft orders containing the “customary conclusions of law” or “appropriate conclusions of law, including jurisdiction matters.” However, as detailed *supra*, each such statement follows an oral order with conclusions of law sufficient to dispense of each motion to suppress, and therefore any additional “customary conclusions of law” would be unnecessary surplusage.

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should not, assume error by the trial judge when none appears in the record before the appellate court.” *State v. Phifer*, 290 N.C. 203, 212, 225 S.E.2d 786, 792 (1976) (citation omitted). In light of these presumptions and the explicit findings and conclusions in the transcript before us, we will not construe the trial court’s characterization of the same as “sketches” as an intention to enter written orders contrary to the facts found and conclusions reached on the record; nor will we construe its instructions to counsel to do likewise.

b. Admission of the Mustang and Gun Photos

[3] Defendant next argues that the trial court erred in admitting the Mustang and Gun Photos over his objection pursuant to Rules 401, 402, 403 and 404(a)-(b). In reviewing such a decision by a trial court,

we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court’s Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). As for determinations of relevancy, those “technically are not discretionary and therefore are not reviewed under the abuse of discretion standard[.]” *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991). They are, however, “given great deference on appeal.” *Id.* at 502, 410 S.E.2d at 228 (citation omitted).

Neither this Court nor our Supreme Court appears to have set forth a plain statement of the standard of review applicable to rulings regarding Rule 404(a). However, a survey of appellate decisions applying the Rule shows that such review generally follows a *de novo* standard. *See, e.g., State v. Walston*, 367 N.C. 721, 766 S.E.2d 312 (2014) (reviewing the exclusion of evidence under Rule 404(a)(1) under an apparent *de novo* standard to determine whether the evidence in question fell within the rule or an exception thereto); *State v. Clapp*, 235 N.C. App. 351, 362-63, 761 S.E.2d 710, 718 (2014) (applying a “loose *de novo* standard of review” to the exclusion of witness testimony under Rule 404(a)(1)).

Defendant’s argument for exclusion of the Mustang and Gun Photos based on Rules 404(a) and (b) is premised on the assumption that possession of a firearm and flashing gang signs “show[] bad character and

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bad acts.” We fail to see how possession of a firearm is indicative of bad acts or bad character—gun ownership is enshrined in the Second Amendment to the United States Constitution, and we do not believe the exercise of that right indicates a person’s poor character. Indeed, Defendant’s own brief fails to identify any basis for such a conclusion. As for any purported gang signs, we fail to see how the hand signals in the Mustang Photo indicate gang affiliation in any way. As detailed *supra*, the photo shows two men with four fingers of their left hands extended—a common hand gesture representing the number “4,”—while one man has his right hand in a closed fist with his middle finger extended—a common expression of vulgarity. Nothing in the record suggests that either gesture indicates gang affiliation; besides, the trial judge instructed “the District Attorney’s office not to ask any questions about signs or gang affiliation based on this picture.” Reviewing the issue *de novo*, we hold that neither the Mustang nor the Gun Photos fall within the ambit of Rule 404 and overrule Defendant’s argument on this question.

[4] We likewise reject Defendant’s argument that the Mustang and Gun Photos were inadmissible under Rules 401 and 402. Defendant compares this case to our decision in *State v. Godley*, 140 N.C. App. 15, 535 S.E.2d 566 (2000), holding that trial court erred by allowing the State to use a police officer’s firearm as a prop to illustrate the defendant’s testimony. 140 N.C. App. at 25, 535 S.E.2d at 574. But in *Godley*, no evidence indicated that the gun used by the defendant bore any relation to the prop gun, other than testimony that the defendant’s firearm “[c]ould have been a little bigger.” *Id.* at 25, 535 S.E.2d at 574 (alteration in original) (internal quotation marks omitted). Here, there is an evidentiary connection between the photos in question, the crime, and the accused—the Gun and Mustang Photos were obtained from Defendant’s phone, show he had access to firearms and the Mustang, and depict him at almost the precise location where the shooting took place. One of the gun photos shows Defendant in possession of a firearm resembling that used in the shooting as described by Monje.⁷ Because this evidence has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable . . . than it would be

7. Monje told Detective Merritt that she saw a “black and very small” gun at the shooting. Each of the Gun Photos shows a black gun in a person’s lap. Defendant asserts that the black firearms in the Gun Photos are entirely dissimilar to the description given by Monje; we disagree, as each photo shows at least one gun that could reasonably be characterized as both black and very small. The degree to which this reasonable characterization of the evidence is credible, probative, and ultimately persuasive is, naturally, a question for the jury.

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without the evidence,” N.C. Gen. Stat. § 8C-1, Rule 401 (2017), and in appropriate deference to the determination made by the trial court, *Wallace*, 104 N.C. App. at 502, 410 S.E.2d at 228, we hold the trial court did not err in admitting the Gun and Mustang Photos as relevant under Rules 401 and 402.

The trial court also did not abuse its discretion in concluding the Gun and Mustang Photos were not subject to exclusion pursuant to Rule 403. Defendant’s briefs pay lip service to Rule 403, but he cites no authority for his argument. Defendant’s brief assumes the conclusion that the Mustang and Gun Photos were irrelevant; having held to the contrary, we reject this argument as well. While Defendant’s briefing does posit that this evidence was grossly prejudicial, such a contention appears to be made in the context of showing prejudicial error—not in the context of a Rule 403 analysis. Thus, having held that the Mustang and Gun Photos were relevant and admissible under Rules 401, 402, and 404, we hold the trial court did not abuse its discretion in ruling the probative value of this evidence was not outweighed by its potential for undue prejudice.

c. Admission of Monje’s In-Court Identification

[5] Defendant’s final argument asserts that the trial court erred in denying his ID Motion, arguing that the trial court failed to make any conclusions of law and likewise failed to make three findings concerning: (1) the absence of a completed witness confidence statement at a photo line-up; (2) her inability to choose between a photo of Defendant and another man in the photo line-up; and (3) whether she heard Defendant’s name while riding with the police to identify the silver Mustang on the day of the shooting. We reject Defendant’s argument.

First, the trial court made conclusions of law, stating at the hearing that “[t]he Court would find that the witness’s testimony is admissible. It appears to the Court that it would be appropriate for the jury to determine the credibility of this witness and that there’s a sufficient basis for the evidence to go before the jury. I would find that the evidence is relevant. I would find, after considering all the information before the Court at this time, that it would survive the balancing test.” As to the findings Defendant contends should have been made, there was no conflict in the evidence concerning a missing eyewitness confidence statement or Monje’s inability to pick a single picture in the earlier photo line-up; thus, express factual findings on these issues were not required. *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674. Lastly, the trial court could not have made a finding that Monje heard Defendant’s name while riding with police, as

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no evidence was introduced showing such a fact.⁸ Assuming *arguendo* that such evidence was in the record, it is relevant not to the admissibility of Monje's testimony but rather to its credibility—a point conceded by Defendant's counsel at oral argument. Because the credibility of an in-court identification is a question for the jury, *Moses*, 350 N.C. at 767, 517 S.E.2d at 869, Defendant's final argument is overruled.

III. CONCLUSION

Although the prosecutor in this case failed to comply with the requests of the trial court to enter written orders on Defendant's various motions to suppress, this failure does not render the oral findings and conclusions made by the trial court on the record erroneous. The trial court's oral rulings on the motions are without error, because they state sufficient findings of fact resolving any material conflicts in the evidence and conclusions of law that apply the law to those factual findings. Because the record permits us to conduct "meaningful appellate review of the trial judge's decision" under these circumstances, *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674, Defendant's argument to the contrary is rejected. We further hold that the trial court did not err in admitting the Mustang and Gun Photos pursuant to Rules 401, 402, 403, and 404(a)-(b), nor did it err in admitting Monje's in-court identification of Defendant.

NO ERROR.

Judges DILLON and DAVIS concur.

8. There was some evidence introduced that police discovered Defendant's name from his Mustang's registration once it was identified by Monje, but nothing in the record indicates that Monje was in the vehicle with police, or in a position to overhear police discussing Defendant's name, when that information was shared between police. To the contrary, Monje testified that she did not know Defendant's name when she gave her statement to Detective Merritt—after Monje had identified the Mustang and Defendant's name had been discovered by authorities. She further testified that she first heard Defendant's name when he was arrested. Detective Merritt similarly testified that neither he nor any other officer mentioned Defendant's name to Monje, and that only a description of the Mustang was broadcast by radio. The officer that ran the Mustang's license plate testified that he communicated the plate number over the radio and that other officers could pull up Defendant's name on their onboard computers, but he did not testify that Defendant's name was ever broadcast aloud.

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STATE OF NORTH CAROLINA

v.

SHIRLYE CORNELIA GRANDY, DEFENDANT

No. COA18-79

Filed 2 October 2018

Embezzlement—entrustment of funds—supervisor's security device

The State presented sufficient evidence to convict defendant of embezzling funds from her employer where defendant was the director of accounting for a state university foundation and was entrusted with her own security device and her supervisor's security device, both of which were required in order to access the employer's funds. The bank's intent to require two foundation employees to participate in each transaction as a security measure did not negate the fact that defendant's employer entrusted her with its funds and both security devices.

Appeal by defendant from judgment entered 2 October 2017 by Judge Tanya T. Wallace in Superior Court, Guilford County. Heard in the Court of Appeals 22 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Torrey D. Dixon, for the State.

Leslie Rawls, for defendant-appellant.

STROUD, Judge.

Defendant appeals her two convictions for embezzlement. Defendant's sole argument on appeal is that her motion to dismiss the embezzlement charges should have been granted because her employer had not entrusted her with the funds since the employer's bank required two employees jointly to use a security measure provided by the bank to issue checks. Because the evidence showed that defendant's employer had entrusted defendant with both security devices, despite the bank's intention to require participation by two employees, the trial court did not err in denying her motion.

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I. Background

The State's evidence showed that defendant was the director of accounting for North Carolina A&T University Foundation, Inc. ("the Foundation"). After a check did not timely clear, other employees in the Foundation began to investigate financial discrepancies. During the investigation, defendant admitted both to other employees and law enforcement that she had transferred money from the Foundation's account into her personal account. The total amount transferred to defendant was \$402,402.99. Defendant was tried by a jury, convicted of two counts of embezzlement and one count of corporate malfeasance, and sentenced by the trial court. Defendant appeals.

II. Motion to Dismiss

Defendant makes only one argument on appeal,¹ contending her motion to dismiss the embezzlement charges should have been allowed "because embezzlement requires the accused to have been entrusted with the property taken and the State's evidence showed that [defendant] took the funds by using her supervisor's security device without permission[.]" (Original in all caps).

The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.

State v. Johnson, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted).

N.C. Gen. Stat. § 14-90 defines the offense of embezzlement and requires the State to present proof of the following essential elements: (1) that the defendant, being more than 16 years of age, acted as an agent or fiduciary for his principal, (2) that he received money or valuable

1. Defendant does not contest her conviction for corporate malfeasance.

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property of his principal in the course of his employment and by virtue of his fiduciary relationship, and (3) that he fraudulently or knowingly misapplied or converted to his own use such money or valuable property of his principal which he had received in his fiduciary capacity.

State v. Rupe, 109 N.C. App. 601, 608, 428 S.E.2d 480, 485 (1993); *see also* N.C. Gen. Stat. § 14-90 (2017); *State v. Robinson*, 166 N.C. App. 654, 658, 603 S.E.2d 345, 347 (2004) (“To survive a motion to dismiss a charge of embezzlement, the State must have presented evidence of the following: (1) Defendant was the agent of the complainant; (2) pursuant to the terms of his employment he was to receive property of his principal; (3) he received such property in the course of his employment; and (4) knowing it was not his, he either converted it to his own use or fraudulently misapplied it.” (citation and quotation marks omitted)).

Defendant’s only argument on appeal is that she was not entrusted with the funds in the course of her employment. *See generally Rupe*, 109 N.C. App. at 608, 428 S.E.2d at 485. To access the funds, the employer’s bank required defendant to use both her own security device, which they referred to as a “key fob,” along with her supervisor’s key fob. The bank issued the key fobs to each employee individually, so defendant contends “[n]either the funds nor the key fob was entrusted to [defendant]. Without the property having been entrusted, embezzlement did not occur.”

Defendant compares her case to *State v. Weaver*, 359 N.C. 246, 607 S.E.2d 599 (2005). In *Weaver*, our Supreme Court reversed an embezzlement conviction where the defendant-employee took a company signature stamp without her employer’s knowledge or permission and used it to write checks to herself:

The dispositive issue presented for review on direct appeal is whether the lawful possession or control element of the crime of embezzlement was satisfied when an administrative employee took a corporate signature stamp without permission and wrote unauthorized corporate checks, thereby misappropriating funds from her employer. That employee’s misappropriation is the basis of defendant’s convictions for aiding and abetting embezzlement and conspiracy to embezzle. We conclude that the employee did not lawfully possess or control the misappropriated funds and therefore affirm the decision of the Court of Appeals which reversed defendant’s convictions.

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359 N.C. at 247, 607 S.E.2d at 599. Defendant argues a key fob is the modern-day equivalent of a signature stamp, so the State did not meet the elements of embezzlement. *See id.*

However, the facts of *Weaver* are different from this case, because the employer in *Weaver* had not authorized the defendant to write checks or to use the signature stamp. *Id.* The Court in *Weaver* explained,

In the instant case, it is undisputed that [defendant] had no independent authority to write checks from R & D accounts or to use Shirley Weaver's signature stamp. In fact, both [defendant] and Shirley Weaver testified that direct authorization from Shirley was required before [defendant] wrote each individual check. Although the record is unclear as to the exact location of each check used to misappropriate the company funds, the record indicates that the signature stamp was kept in a desk drawer in Shirley Weaver's office and that [defendant] could not access this stamp without Shirley Weaver's direct permission. While [defendant] had access to the checks and signature stamp by virtue of her status as an employee at R & D and International Color, we cannot say, based on these facts, that [defendant's] possession of this property was lawful nor are we persuaded that this property was under [defendant's] care and control as required by N.C.G.S. § 14-90. Because [defendant] never lawfully "possessed" the misappropriated funds and because the funds were not "under [her] care" we conclude that [defendant] did not commit the crime of embezzlement as defined in N.C.G.S. § 14-90.

Weaver, 359 N.C. at 256, 607 S.E.2d at 605 (emphasis omitted); *see also State v. Palmer*, 175 N.C. App. 208, 213, 622 S.E.2d 676, 680 (2005) ("In this case, like in *Keyes* and *Weaver*, Defendant never took lawful possession of the incoming checks, nor was she entrusted with the checks by virtue of a fiduciary capacity." (emphasis omitted)).

Defendant ignores the fact that here, unlike in *Weaver*, *Palmer*, and *Keyes*—all cases she cited—her employer, the Foundation, entrusted her with both its funds and both key fobs, even if the bank intended otherwise. *Cf. Weaver*, 359 N.C. at 256, 607 S.E.2d at 605; *Palmer*, 175 N.C. App. at 213; 622 S.E.2d at 680; *State v. Keyes*, 64 N.C. App. 529, 532, 307 S.E.2d 820, 823 (1983) ("Here, [neither defendant] received, took lawful possession of, or were entrusted with components by virtue of

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a fiduciary capacity.”). Defendant had “lawful possession or control” of both her own key fob and her supervisor’s key fob. Defendant kept both fobs during the course of her employment as the director of accounting from approximately 2008 to 2014 and she routinely wrote checks using both fobs.² Although the *bank* intended for two employees to participate in each transaction as a security measure, the Foundation did not require its employees to use the key fobs as the bank intended. Instead, the Foundation “entrusted” the entire process to defendant. The former executive director of the Foundation testified that defendant’s duties included “[p]rocessing checks and depositing them and overseeing finances and payroll and things like that.” Defendant’s supervisor was also entrusted with the funds and there was a dual security measure in place, but the evidence showed that the Foundation had entrusted defendant with such funds; exclusivity of the entrustment is not an element of the crime. *See* N.C. Gen. Stat. § 14-90. Therefore, the trial court did not err in denying defendant’s motion to dismiss. This argument is overruled.

III. Conclusion

We conclude there was no error.

NO ERROR.

Judges ZACHARY and MURPHY concur.

2. The evidence does not show the exact dates the Foundation opened the relevant bank accounts or when the bank issued the key fobs, but it does tend to show the Foundation allowed defendant to handle financial transactions in this manner for an extended time period prior to 2011 and 2014, when transactions for which defendant was charged with embezzlement occurred.

STATE v. ISAACS

[261 N.C. App. 696 (2018)]

STATE OF NORTH CAROLINA

v.

DEBBY ROMINGER ISAACS, DEFENDANT, AND FRANCISCO Q. TAVLAVERA,
BAIL AGENT, UNITED STATES SURETY COMPANY, SURETY COMPANY AND
WATAUGA COUNTY BOARD OF EDUCATION, JUDGMENT CREDITOR

No. COA17-1397

Filed 2 October 2018

1. Sureties—motion to set aside bond forfeiture—judicial notice—material not attached to motion

In a proceeding to set aside a bond forfeiture, the trial court did not abuse its discretion by taking judicial notice of the order to arrest defendant even though the surety failed to attach the order to its motion, because the arrest order was beyond reasonable controversy and part of the history of the case.

2. Sureties—motion to set aside bond forfeiture—amendment—outside of statutory motion period

In a proceeding to set aside a bond forfeiture, the trial court did not err in allowing a surety to amend its motion by attaching the order to arrest defendant, even though the statutory 150-day period had expired, because the rules of civil procedure authorize trial courts to use their discretion to liberally allow pleading amendments, and the opposing party failed to show how allowing the amendment to include undisputed facts would cause material prejudice.

Appeal by the Watauga County Board of Education from order entered 4 August 2017 by Judge Theodore W. McEntire in Watauga County District Court. Heard in the Court of Appeals 23 August 2018.

*Miller & Johnson, PLLC, by Nathan A. Miller, for appellant
Watauga County Board of Education.*

Brian D. Elston for appellee United States Surety Company.

TYSON, Judge.

The Watauga County Board of Education (the “Board”) appeals from an order allowing the United States Surety Company’s (“Surety”) motion to set aside a bond forfeiture. We affirm.

STATE v. ISAACS

[261 N.C. App. 696 (2018)]

I. Background

Debby Rominger Isaacs (“Defendant”) failed to appear for her scheduled court date in Watauga County District Court on 6 December 2016. The court issued an order for her arrest. The Watauga County Clerk of Court issued a bond forfeiture notice in the amount of \$10,000 to Defendant, Surety, and Surety’s bail agent on 9 December 2016. Notice was mailed to all parties the same day. Surety served the order for arrest and surrendered Defendant to the Watauga County sheriff on 2 May 2017.

Surety’s bail agent timely filed a motion to set aside the bond forfeiture on 8 May 2017, 150 days after forfeiture notice. Form AOC-CR-213, the preprinted form used for motions to set aside, lists seven reasons, pursuant to N.C. Gen. Stat. §15A-544.5, for which a bond forfeiture may be set aside, with corresponding boxes for a movant to mark the alleged basis or grounds for setting aside the forfeiture. In the present case, the motion to set aside filed by Surety’s bail agent indicated reason number four, N.C. Gen. Stat. §15A-544.5(b)(4), that Defendant had been served with an order for arrest for the failure to appear on the bonded criminal charge, as evidenced by a copy of an official court record including an electronic record.

However, attached to Surety’s motion to set aside was the warrant for Defendant’s initial arrest, dated 21 September 2016, rather than the order for arrest for Defendant’s failure to appear, served on 2 May 2017. The Board objected to the motion to set aside. A hearing was set for 25 May 2017, 167 days after notice of forfeiture.

At the hearing, Surety submitted a handwritten motion to amend its motion to set aside, including what turned out to be an incomplete copy of the 2 May 2017 order for arrest without the certificate of service. Surety’s amended motion sought to include N.C. Gen. Stat. §15A-544.5(b)(3) as an additional reason to set aside forfeiture evidenced by a copy of Defendant’s surrender to the sheriff, dated 2 May 2017. Surety then orally moved to amend its amended motion to set aside, in order to include the complete copy of the order for arrest served on 2 May 2017.

The trial court was concerned about the wrong documentation being attached, and the amended motion with supplemental information, being filed the morning of the hearing. The trial court allowed Surety 15 days to supplement and for the Board to object and request a new hearing. The trial court found there had “been no justification or excuse for [Surety] filing the wrong form, and that the [Board] filed the good faith objection” and the Board had incurred both fees and extra

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time in this matter because of a “completely willful error” by Surety. Surety’s counsel indicated Surety would pay for the Board’s fees for that hearing.

The Board’s counsel indicated that after the 15 day period to supplement, the Board would not be able to object and would not waste time requesting a new hearing. Instead, counsel indicated the Board’s intention to appeal and requested the trial court to issue its ruling on the bond motion. The trial court found Defendant had been served with an order for arrest, evidenced by a copy of an official court record, the Surety had cited a correct statutory reason to set aside the forfeiture, and took judicial notice of the file as evidence to show Defendant was served with the order of arrest.

The trial court filed a written order on 4 August 2017, which granted Surety’s motion to set aside on the grounds that “one of the statutory grounds is satisfied as Defendant was arrested on an order for arrest prior to the final judgment date of May 8, 2017.” The order indicated the “conclusions of law dispose[d] of the matter and [did] not reach Surety’s motion to amend[,]” but also granted Surety’s motion to amend. The Board appeals.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-544.5(h) (2017).

III. Issues

The Board argues the trial court erred when it considered matters outside the filed motion and took judicial notice of Defendant’s later arrest warrant. The Board also argues the trial court erred when it allowed an amendment and evidence presented after the final forfeiture date.

IV. Standards of Review

“In an appeal from an order setting aside a bond forfeiture, the standard of review for this Court is whether there was competent evidence to support the trial court’s findings of fact and whether its conclusions of law were proper in light of such facts.” *State v. Knight*, __ N.C. App. __, __, 805 S.E.2d 751, 753 (2017) (citation and internal quotation marks omitted). “[T]he standard of review of a trial court’s decision to exclude or admit evidence is that of an abuse of discretion. An abuse of discretion will be found only when the trial court’s decision was so arbitrary that it could not have been the result of a reasoned decision.” *Brown*

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v. City of Winston-Salem, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (2006) (citations and internal quotation marks omitted).

V. AnalysisA. Bond Forfeiture

Following a bonded defendant's failure to appear, "the court shall enter a forfeiture . . . against each surety on the bail bond." N.C. Gen. Stat. § 15A-544.3(a) (2017). The court must give written notice of this entry of forfeiture to the defendant and any surety listed on the bail bond, to be delivered via first-class mail. N.C. Gen. Stat. § 15A-544.4 (2017). This notice requirement triggers a 150-day period in which the defendant, "any surety," a "professional bondsman or runner acting on behalf of a professional bondsman," or a "bail agent acting on behalf of an insurance company" may file a written motion to set aside the forfeiture. N.C. Gen. Stat. § 15A-544.5(d) (2017).

Bond forfeiture will only be set aside for compliance with one of seven statutorily enumerated reasons. Each of the seven reasons requires proof. The statute provides, in relevant part:

(3) The defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, *as evidenced by* the sheriff's receipt provided for in that section.

(4) The defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question *as evidenced by* a copy of an official court record, including an electronic record.

N.C. Gen. Stat. § 15A-544.5(b)(3)-(4) (2017) (emphasis supplied).

The board of education may object to the motion to set aside, and when such a written objection is filed, a hearing on the motion will be held within 30 days. N.C. Gen. Stat. § 15A-544.5(d)(5).

B. Judicial Notice

[1] The Board argues the trial court erred in considering matters outside the filed notice and taking judicial notice of the file as evidence Defendant was served with the order of arrest. We disagree.

"A court may take judicial notice, whether requested or not." N.C. Gen. Stat. § 8C-1, Rule 201(c) (2017). Rule 201 only applies to "adjudicative facts." *Id.* "With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy." N.C. Gen. Stat. § 8C-1, Rule 201 advisory committee note.

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“A trial court may take judicial notice of earlier proceedings in the same cause,” including matters in the file not offered into evidence. See *In re Isenhour*, 101 N.C. App. 550, 552-53, 400 S.E.2d 71, 72-73 (1991) (finding the trial court did not err when it made “plain that it had reviewed the file and was considering the history of the case in conducting the hearing” and “[n]either party was required to offer the file into evidence”); see also Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 26 (7th ed.) (“there also seems little reason why a court should not notice its own records in any prior or contemporary case when the matter noticed has relevance”).

Here, the trial court took judicial notice of a fact “beyond reasonable controversy.” It is undisputed that Defendant was served with an order of arrest on 2 May 2017, prior to the 150-day statutory deadline. The trial court attached the 2 May 2017 order of arrest as an exhibit to the court’s order. Counsel for the Board acknowledged that with the inclusion of the entire 2 May 2017 order of arrest, the Board would have no grounds to object to Surety’s motion to set aside the bond forfeiture.

The trial court did not abuse its discretion when it admitted the 2 May 2017 order for arrest into the record. The Board’s argument is overruled.

C. Motion to Amend

[2] The Board contends the trial court committed reversible error by granting Surety’s motion to amend and allowing Surety to attach the appropriate order for arrest after the expiration of the 150-day period. We disagree.

“[A] bond forfeiture proceeding, while ancillary to the underlying criminal proceeding, is a civil matter[,]” and the rules of civil procedure apply. *State ex rel. Moore Cty. Bd. of Educ. v. Pelletier*, 168 N.C. App. 218, 222, 606 S.E.2d 907, 909 (2005). “Under Rule 15(a) of the North Carolina Rules of Civil Procedure, leave to amend a pleading shall be freely given except where the party objecting can show material prejudice by the granting of a motion to amend.” *Martin v. Hare*, 78 N.C. App. 358, 360, 337 S.E.2d 632, 634 (1985) (citation omitted). This liberal policy for amendment supports “the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities.” *Mangum v. Surles*, 281 N.C. 91, 99, 187 S.E.2d 697, 702 (1972).

“A motion to amend is addressed to the discretion of the trial court.” *Henry v. Deen*, 310 N.C. 75, 82, 310 S.E.2d 326, 331 (1984). “The party opposing the amendment has the burden to establish that it would

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be prejudiced by the amendment.” *Carter v. Rockingham Cty. Bd. of Educ.*, 158 N.C. App. 687, 690, 582 S.E.2d 69, 72 (2003) (citation omitted). “Rulings on motions to amend after the expiration of the statutory period are within the discretion of the trial court[.]” *Lee v. Keck*, 68 N.C. App. 320, 326, 315 S.E.2d 323, 328 (1984).

The Board argues that allowing an amendment after the expiration of the 150-day statutory period to challenge would cause undue prejudice to the Board and cites to an unpublished opinion of this Court for support. In *State v. Cook*, the sureties filed a motion to set aside forfeiture, but failed to attach the order for arrest supporting the motion. 228 N.C. App. 360, 748 S.E.2d 775, 2013 WL 3776968 at *1 (unpublished). The board of education filed an objection, and the sureties filed an amended motion with the required documentation. *Id.*

Because the “amendment was filed prior to the hearing on sureties’ motion and within the statutory time limit pursuant to N.C. Gen. Stat. § 15A-544.5(d)(1),” it prevented “any unfair prejudice” to the board of education. *Id.* at *3. This Court did not address the issue of whether a motion to set aside filed within the statutory period could be amended after the expiration of the 150 days. *Id.* at *3, n.1.

The Board argues that to allow an amendment to the motion after the statutory time period creates undue prejudice because a school board “can no longer rely on the time limit as set forth by the General Assembly.” Further, when a school board files an objection it “expends precious and limited tax payer funds . . . in anticipation . . . that [it] will prevail because the [s]urety filed a faulty motion and the statutory time period has passed.”

By its own admission, the only prejudice the Board faced as a result of the trial court allowing the amendment was the added time of its attorney. In this case, recognizing the possible harm and cost to the Board, Surety offered to pay the Board’s attorney’s fees incurred for the hearing. Surety’s offer was consistent with the statutory remedy available in this instance:

If at the hearing [to set aside forfeiture] the court determines that the . . . documentation required to be attached . . . was not attached to the motion at the time the motion was filed, the court may order monetary sanctions against the surety filing the motion, unless the court also finds that the failure . . . to attach the required documentation was unintentional.

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N.C. Gen. Stat. 15A-544.5(d)(8) (2017). Although the Board did not request the trial court impose sanctions, this statutory provision indicates the General Assembly's intent to allow the trial court discretion to resolve such missteps, and that Surety's errors did not as a matter of law preclude it from obtaining relief.

The Board's position to not allow an amendment tends to contradict the intended policy of the bond system: "[t]he goal . . . is the production of the defendant, not increased revenues for the county school fund." *State v. Locklear*, 42 N.C. App. 486, 489, 256 S.E.2d 830, 832 (1979). The Board's arguments are overruled.

VI. Conclusion

When the motion to set aside cites to at least one statutory reason, supported by evidence, the trial court must grant the motion. N.C. Gen. Stat. §15A-544.5(a, b) ("a forfeiture *shall* be set aside for any one of the following reasons" (emphasis supplied)). The record contains competent evidence to support the trial court's granting of Surety's motion to set aside.

As part of its ruling, the trial court correctly expressed reservations about the last minute substitution of the timely order for arrest and receipt of the surrender of Defendant to the sheriff. We agree sanctions would have been appropriate if Surety had not attempted to remediate its own initial failings, or if the Board had not accepted the Surety's offer of attorney's fees as a sanction. However, under these facts, the Board has failed to show any prejudice or that the trial court abused the discretion given to it under the North Carolina Rules of Evidence, North Carolina Rules of Civil Procedure, and the express provisions of the statute itself.

The Board has failed to show the trial court abused its discretion in taking judicial notice of the court's file and of the timely and appropriate order for arrest and surrender of Defendant. *See In re Isenhour*, 101 N.C. App. at 552-53, 400 S.E.2d at 72-73. Whether to allow Surety's motion to amend under Rule 15 also rested within the trial court's discretion.

The Board failed to show how allowing the amendment to include undisputed facts in the court file caused "material prejudice." *See Martin*, 78 N.C. App. at 360, 337 S.E.2d at 634. The trial court's ruling is affirmed. *It is so ordered.*

AFFIRMED.

Judges INMAN and BERGER concur.

STATE v. McQUEEN

[261 N.C. App. 703 (2018)]

STATE OF NORTH CAROLINA
v.
BERTIE DELVON LATEZ McQUEEN

No. COA17-1415

Filed 2 October 2018

1. Constitutional Law—effective assistance of counsel—principal State’s witness—alleged failure to expose existence of immunity deal

In a prosecution for murder and robbery, defendant’s trial counsel was not ineffective for failing to ensure the jury was informed that the principal witness against defendant could have been charged with first-degree murder based on felony murder but was not. Although defendant believed the witness’s testimony was secured through an immunity agreement and that the witness received something of value in exchange for his testimony which affected his credibility, there was no evidence of such an agreement. Further, defense counsel attempted to elicit information about a deal and requested related jury instructions.

2. Appeal and Error—preservation of issues—due process—prosecutorial misconduct

In a prosecution for murder and robbery, defendant failed to preserve for appellate review arguments that the prosecutor failed to correct incorrect testimony, elicited incorrect testimony, and recited the law incorrectly in closing argument, because he did not raise these issues at trial.

Appeal by defendant from judgment entered 25 January 2017 by Judge V. Bradford Long in Guilford County Superior Court. Heard in the Court of Appeals 22 August 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ann W. Matthews, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant.

ELMORE, Judge.

Defendant Bertie Delvon Latez McQueen appeals from judgment entered upon jury verdicts finding him guilty of second degree murder

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and armed robbery. On appeal, defendant argues his trial counsel was ineffective by failing to ensure the jury knew that the State's key witness could have been charged with first degree murder in the case, but was not. Defendant further contends he was denied a fair trial when the prosecutor failed to correct incorrect testimony, actively elicited incorrect testimony, and recited the law incorrectly in her closing argument.

For the reasons stated herein, we conclude that defendant received effective assistance of counsel as well as a fair trial, free from error.

I. Background

On 18 November 2013, a grand jury indicted defendant for the 2 July 2013 shooting death and robbery of Derrick Rogers ("the victim"). Defendant presented no evidence at trial, while the State's evidence relevant to the issues on appeal tended to show the following.

Damon Bell testified that on 2 July 2013, defendant called him to buy a quarter pound of marijuana. With the marijuana in tow, Bell drove a white Cadillac to pick defendant up from his apartment, and the two proceeded to drive to a different apartment complex at defendant's instruction. Defendant told Bell where to park upon arriving at the complex, and the victim entered the back passenger side of the vehicle and sat behind defendant, who then handed the victim the marijuana.

The victim examined the marijuana, said he liked its quality, requested a half pound instead of a quarter pound, and handed it back to defendant. According to Bell, defendant then pulled out a gun; said, "Look at my new rack"; and shot the victim once in the chest. Bell had never seen the gun before and said to defendant, "Excuse me? What the f*** was that?" Defendant responded by pointing the gun at Bell and instructing him to drive to another apartment complex.

When they arrived at that complex, Bell stayed in the vehicle while defendant pulled the victim out of the back seat and onto the ground. Defendant then re-entered the vehicle and told Bell to drop him off at a nearby housing development. Bell testified that when defendant eventually exited the vehicle, he was holding the victim's chain necklace. Bell went home and did not call the police.

In November 2013, Bell was arrested for accessory after the fact to first degree murder and given a secured bond. Two months later, his bond was changed to \$275,000.00 unsecured. Bell testified that he did not consider the lack of a murder charge against him or being released on house arrest for the three years prior to defendant's trial to be a "deal" with the State. On direct examination, the prosecutor specifically

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asked Bell, “What if anything have you been offered in exchange for your testimony?,” to which Bell responded, “Nothing.” Defense counsel nevertheless pursued the issue on cross-examination:

Q: Eventually there was a consent order to get [you] out of jail, wasn’t there?

A: Yep.

....

Q: You walked right out the door, didn’t you?

A: Absolutely.

Q: And that was part of your deal for testifying, wasn’t it?

A: I have no deal.

Detective Mike Matthews of the Greensboro Police Department testified to interviewing Bell prior to his arrest for accessory after the fact. While Bell had initially denied knowing defendant or recognizing the victim, he ultimately gave Detective Matthews a version of events consistent with Bell’s testimony at defendant’s trial.

On cross-examination by defense counsel, Detective Matthews testified to his understanding that Bell was not “eligible for the felony murder rule” and could not be arrested for first degree murder because Bell “did not know there was going to be somebody lose [sic] their life to do this narcotics transaction.” Detective Matthews went on to state, “And I may be wrong, not a lawyer, but my knowledge of the felony murder rule would not include selling drugs.” The issue was addressed again on re-direct examination by the prosecutor:

Q: Just briefly I want to talk about this felony murder. Isn’t it usually a dangerous felony that has to have occurred like a robbery with a dangerous weapon?

A: Yes, ma’am. There’s a list of felonies. I don’t exactly have the list memorized, but there’s a list. Yes, ma’am.

Q: In order to charge Mr. Bell with felony murder, wouldn’t you have to have some evidence that he knew a robbery was going to take place?

A: That would be correct.

In her closing argument, the prosecutor generally addressed the law of first degree murder in North Carolina. She argued that the evidence

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at trial showed premeditation and deliberation on the part of defendant, which she described as “the first way to get to first degree murder[.]” The prosecutor continued by asserting that the second way

is called the felony murder rule. There’s been some discussion about that. If you engage in what’s called an inherently dangerous felony, . . . the law presumes it’s foreseeable that someone could die during the commission of one of those felonies. So, if that happens, you’re guilty of felony murder. And there’s been some discussion about Mr. Bell’s charges. . . . I have signed an indictment. So if you don’t like what Bell got charged with, it’s on me. Doesn’t excuse him, and it doesn’t let him get away with murder. I would have to have some evidence that Bell knew the defendant had a gun in order to charge him with felony murder, and I don’t have that.

The prosecutor then returned her argument to defendant, stating to the jury that “if you believe, based on the evidence that the defendant wanted to rob [the victim], or did rob [the victim], and [the victim] got killed as a result of that robbery with the gun, then the defendant is guilty of felony murder.”

The jury returned verdicts finding defendant guilty of second degree murder and armed robbery. Defendant appeals.

II. Discussion

On appeal, defendant first contends his trial counsel was ineffective by failing to ensure the jury was informed that Bell could have been charged with first degree murder based on the felony murder rule, but was not. Defendant also argues that he was denied a fair trial when the prosecutor failed to correct incorrect testimony, actively elicited incorrect testimony, and recited the law incorrectly in her closing argument.

As an initial matter, we note that defendant concedes he did not enter timely notice of appeal and has therefore petitioned this Court for a writ of certiorari. Because the infirmity is technical in nature, and because the State does not oppose the petition, we exercise our discretion to issue a writ of certiorari and address the merits of defendant’s appeal.

A. Ineffective Assistance of Counsel

[1] According to defendant, his trial counsel “was ineffective for failing to make sure the jury knew that Damon Bell could have been charged with first[] degree murder.” He specifically contends that counsel “did

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not come to court armed with pertinent case law that could have been used to correct inaccuracies [about the felony murder rule] in Detective Matthews' testimony and the prosecutor's closing argument."

i. Standard of review

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citation omitted). To meet this burden, the defendant must first show

that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 562, 324 S.E.2d at 248 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). "The question becomes whether a reasonable probability exists that, absent counsel's deficient performance, the result of the proceeding would have been different." *State v. Moorman*, 320 N.C. 387, 398, 358 S.E.2d 502, 510 (1987) (citing *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2068).

ii. Analysis

The only act or omission raised by defendant as evidence of ineffective assistance of counsel is his trial counsel's failure to ensure that the jury knew Bell could have been charged with first degree murder in the case, but was not. Defendant specifically identifies four instances in which counsel failed to correct inaccuracies about the felony murder rule in Detective Matthews's testimony as well as the prosecutor's closing argument, and he remains seemingly convinced that Bell's testimony was the result of a deal or immunity agreement with the State that the jury should have been informed about. We disagree.

Prior to the testimony of a witness under a grant of immunity by the State, the trial court "*must* inform the jury of the grant of immunity and the order to testify[.]" N.C. Gen. Stat. § 15A-1052(c) (2017) (emphasis added). Additionally, "the judge *must* instruct the jury as in the case of interested witnesses" during the jury charge. *Id.* (emphasis added). In considering the mandate of N.C. Gen. Stat. § 15A-1052(c), our Supreme

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Court has noted that “[o]bviously, the legislature intended for the jury to know the witness was receiving something of value in exchange for his testimony which might bear on his credibility.” *State v. Hardy*, 293 N.C. 105, 120, 235 S.E.2d 828, 837 (1977).

Additionally, even if the witness is not testifying under a grant of immunity, N.C. Gen. Stat. § 15A-1054 provides that

(a) . . . a prosecutor, when the interest of justice requires, may exercise his discretion not to try any suspect for offenses believed to have been committed . . . , to agree to charge reductions, or to agree to recommend sentence concessions, upon the understanding or agreement that the suspect will provide truthful testimony in one or more criminal proceedings.

. . . .

(c) When a prosecutor enters into any arrangement authorized by this section, written notice fully disclosing the terms of the arrangement must be provided to defense counsel . . . a reasonable time prior to any proceeding in which the person with whom the arrangement is made is expected to testify.

N.C. Gen. Stat. § 15A-1054 (2017).

Similar to the mandate of N.C. Gen. Stat. § 15A-1052(c), the prosecutor’s obligation to disclose an arrangement made with a witness pursuant to N.C. Gen. Stat. § 15A-1054 does not depend upon a request by defense counsel. *State v. Lowery*, 318 N.C. 54, 62, 347 S.E.2d 729, 735 (1986). However, the statute requires disclosure only when an arrangement has in fact been reached. *State v. Howell*, 59 N.C. App. 184, 187, 296 S.E.2d 321, 322 (1982).

In asserting that his trial counsel was ineffective, defendant essentially argues he suffered prejudice because the jury did not know Bell “was receiving something of value in exchange for his testimony which might bear on his credibility.” *Hardy*, 293 N.C. at 120, 235 S.E.2d at 837. However, counsel repeatedly attempted to elicit that information on cross-examination of both Bell and Detective Matthews. Moreover, during the charge conference, counsel requested that the trial court instruct the jury on the testimony of a witness with immunity or quasi immunity. Counsel argued that because the State could have charged Bell with first degree murder, but instead charged him with the lesser

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offense of accessory after the fact, Bell had “received some sentencing concessions already.”

In response to defense counsel’s argument, the prosecutor adamantly maintained that there had been no discussions with Bell or his attorney related to him testifying in exchange for immunity, a reduction in sentencing, or any other concession that might undermine Bell’s credibility as a witness. The trial court agreed, noting “there’s been no evidence of a grant of immunity or quasi immunity,” and denied defense counsel’s request for that instruction. The court went on to state that it would instruct the jury on the testimony of interested witnesses as well as accomplice testimony, which it believed would “cover the interest of Mr. Bell in this case.”

iii. Conclusion

Although defendant’s trial counsel attempted to elicit testimony regarding a deal between Bell and the State, and requested a jury instruction on the testimony of a witness with immunity, the record reveals that no such deal or immunity agreement existed. Moreover, had there been evidence of an immunity agreement between Bell and the State, the trial court would have been required by N.C. Gen. Stat. § 15A-1052(c) to inform the jury of that agreement. Similarly, had there been evidence of an alternative arrangement between Bell and the State, the prosecutor would have been required by N.C. Gen. Stat. § 15A-1054(c) to provide defense counsel with written notice fully disclosing the terms of that arrangement.

On appeal, defendant does not contend that the trial court violated N.C. Gen. Stat. § 15A-1052(c) or that the prosecutor violated N.C. Gen. Stat. § 15A-1054(c), but argues instead that his trial counsel was ineffective by failing to correct inaccuracies about the felony murder rule such that the jury did not know Bell could have been charged with first degree murder. However, where there is no evidence that the witness received anything of value in exchange for his testimony at defendant’s trial, we cannot conclude that defense counsel’s performance which included persistent attempts to elicit that information and have the court instruct the jury accordingly amounted to ineffective assistance of counsel. This assignment of error is thus overruled.

B. Due Process and Prosecutorial Misconduct

[2] In his second and final argument on appeal, defendant contends “the prosecutor allowed Detective Matthews to falsely testify on recross-examination that Bell could not have been charged with first[] degree

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murder; elicited similar testimony with leading questions on redirect examination of Matthews; and cemented the falsehood in the jurors' minds by stating it in her closing argument." According to defendant, the prosecutor's actions deprived him of a fair trial in violation of the Fourteenth Amendment to the United States Constitution as well as Article I, Section 19 of the North Carolina Constitution.

Defendant concedes that he did not raise this constitutional argument before the trial court. "It is well-established that '[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.'" *State v. Moore*, 185 N.C. App. 257, 265, 648 S.E.2d 288, 294 (2007) (quoting *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001)). Thus, defendant has failed to preserve this issue for appellate review.

III. Conclusion

Because defendant's trial counsel's alleged failure to ensure that the jury knew the State's key witness could have been charged with first degree murder did not amount to ineffective assistance of counsel, and because defendant has failed to preserve his constitutional argument for appellate review, we find no error occurring at the trial court.

NO ERROR.

Judges DILLON and DAVIS concur.

STATE OF NORTH CAROLINA
v.
SHELLEY ANNE OSBORNE

No. COA18-9

Filed 2 October 2018

1. Drugs—possession of heroin—identification of substance—sufficiency of evidence

The State failed to present sufficient evidence to prove defendant possessed heroin even though defendant told an investigating officer that she had ingested heroin, several investigating officers identified the substance seized in defendant's hotel room as heroin, a field test of the substance was positive for heroin, and drug paraphernalia typically used for heroin was found in the hotel room.

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Without evidence that a scientifically valid chemical analysis was performed to identify the seized substance as heroin, the State did not meet its burden of proof beyond a reasonable doubt.

2. Child Abuse, Dependency, and Neglect—misdemeanor child abuse—heroin use in presence of children—sufficiency of evidence

Although the State failed to prove a rock-like substance seized from defendant's hotel room was heroin so as to support a possession of heroin conviction, the trial court properly denied defendant's motion to dismiss a related charge of misdemeanor child abuse on the basis that she used heroin in the presence of her children. That charge did not require the State to prove the seized substance was heroin; evidence that defendant was found unconscious from an apparent drug overdose, her admission that she used heroin, and the presence of drug paraphernalia consistent with heroin use in the hotel room occupied by defendant and her children was sufficient to submit the charge to the jury.

Appeal by defendant from judgments entered 21 February 2018 by Judge Edwin G. Wilson Jr. in Randolph County Superior Court. Heard in the Court of Appeals 20 August 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alesia Balshakova, for the State.

Meghan Adelle Jones for defendant.

DIETZ, Judge.

Defendant Shelley Anne Osborne appeals her conviction for possession of heroin. Law enforcement found Osborne unconscious in a hotel room and, after emergency responders revived her, she admitted she used heroin. Officers searched the hotel room and found syringes, spoons with burn marks and residue, and a rock-like substance.

The State did not have the substance tested using a scientifically valid chemical analysis. Instead, at trial the State relied on Osborne's statement to officers that she used heroin, as well as officers' descriptions of the rock-like substance and the results of field tests on the substance, including one performed in open court.

As explained below, the State's evidence was insufficient to survive a motion to dismiss. The State relies on a series of Supreme Court cases,

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later synthesized in this Court's decision in *State v. Bridges*, __ N.C. App. __, 810 S.E.2d 365 (2018), concerning the defendant's own identification of the seized substance. Here, by contrast, Osborne never identified the seized substance as heroin—she told officers only that she had used heroin before losing consciousness. Although the State's evidence strongly suggests the seized substance was heroin, that evidence was not enough “to establish the identity of the controlled substance beyond a reasonable doubt” and thus the State was required to present “some form of scientifically valid chemical analysis” to survive a motion to dismiss. *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010). Because the State acknowledges that it did not present any scientifically valid chemical analysis at trial, we vacate the trial court's judgment on this count.

Facts and Procedural History

On 17 November 2014, police responded to a call about a possible overdose in a hotel room. After arriving at the hotel room, officers found Defendant Shelley Anne Osborne in the bathroom. She was unconscious, unresponsive, and turning blue. Osborne regained consciousness after emergency responders arrived and administered an anti-overdose drug. When Osborne regained consciousness, she told an officer that she “had ingested heroin.”

The responding officers searched the hotel room and found Osborne's two children, who were around four or five years old. The officers also found multiple syringes, spoons with burn marks and residue on them, and a rock-like substance that appeared to be heroin. An officer conducted a field test on the rock-like substance, which yielded a “bluish color,” indicating a “positive reading for heroin.”

On 14 September 2015, the State indicted Osborne for possession of heroin and two counts of misdemeanor child abuse. At trial, one of the responding officers testified about discovering Osborne unconscious in the hotel room and her admission that she had used heroin. The officer also described the rock-like substance, including how it resembled heroin; explained the results of the field test indicating the substance was heroin; and discussed how other objects found in the hotel room, including the syringes and spoons, were common paraphernalia used to inject heroin. The officer also performed a field test on the substance seized from the hotel room in open court and displayed the results, which indicated the substance was heroin, to the jury. Osborne did not object to the in-court field test. Osborne also did not present any evidence in her defense. She moved to dismiss the charges at the close of the evidence. The trial court denied the motion.

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The jury convicted Osborne on all charges, and the trial court sentenced her to 6 to 17 months in prison for possession of heroin and a consecutive sentence of 60 days for the two counts of misdemeanor child abuse. The trial court suspended both sentences. Osborne appealed.

Analysis

[1] Osborne argues that the trial court erred in denying her motion to dismiss the possession of heroin charge because the State failed to present sufficient evidence that the seized substance was heroin. As explained below, we agree that the evidence presented was insufficient but recognize that this issue is unsettled and may merit further review in our Supreme Court.

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). “Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980).

In a drug possession case, “the burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution.” *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010). “Unless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required.” *Id.*

The State concedes that, other than the field tests conducted by the arresting officers, the State did not conduct any forensic analysis that identified the rock-like substance seized from Osborne’s hotel room as heroin. The State also concedes—or, at least, does not dispute—that the field tests officers conducted at the scene and later at trial are not scientifically valid chemical analyses sufficient to support a conviction.

Instead, the State argues that this case is controlled by a line of decisions from our Supreme Court involving the defendant’s identification of the controlled substance. First, in *State v. Nabors*, 365 N.C. 306, 718 S.E.2d 623 (2011), and *State v. Williams*, 367 N.C. 64, 744 S.E.2d 125 (2013), the Supreme Court held that a defense witness’s in-court

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testimony identifying a substance as cocaine was sufficient to overcome a motion to dismiss even in the absence of forensic analysis. Then, in *State v. Ortiz-Zape*, 367 N.C. 1, 743 S.E.2d 156 (2013), the Supreme Court held that an officer's testimony concerning the defendant's out-of-court identification of the substance as cocaine, combined with the officer's own testimony that the substance appeared to be cocaine, was sufficient to survive a motion to dismiss.

Recently, this Court attempted to synthesize this line of cases into a coherent rule of law. *State v. Bridges*, __ N.C. App. __, 810 S.E.2d 365 (2018). In *Bridges*, the defendant told a law enforcement officer that she had "a bagg[ie] of meth hidden in her bra," and the officer then found a "meth-like" substance in a baggie in the defendant's bra. *Id.* at __, 810 S.E.2d at 366. At trial, the officer described the defendant's statements and the discovery of the baggie. *Id.* We held that "the arresting officer's testimony offered without objection during the State's evidence" was sufficient to meet the State's burden of proof and send the issue to the jury. *Id.* at __, 810 S.E.2d at 367–68.

The State argues that this case is controlled by *Bridges* but there is a key factual distinction between this case and the *Bridges* line of cases. In all of the earlier cases—*Nabors*, *Williams*, *Ortiz-Zape*, and *Bridges*—the defendants' statements (or those of another defense witness) identified the substance seized by law enforcement as a controlled substance. Here, by contrast, Osborne did not identify the seized substance as heroin. Instead, after officers discovered her unconscious in a hotel room and emergency responders administered an anti-overdose medication to revive her, Osborne told the officers that she had ingested heroin. The officers independently searched the hotel room and recovered drug paraphernalia and a rock-like substance believed to be heroin.

We are reluctant to further expand the *Bridges* holding to apply in cases where the defendant did not actually identify the seized substance. To be sure, the State's evidence strongly suggests the seized substance was heroin—Osborne admitted she used heroin, there was drug paraphernalia in the hotel room consistent with heroin use, the rock-like substance found in the hotel room matched the general description of heroin, and a field test indicated the substance was heroin.

But the question is not whether the State's evidence was strong, but whether that evidence "establish[ed] the identity of the controlled substance beyond a reasonable doubt," thus eliminating the need for a scientifically valid chemical analysis. *Ward*, 364 N.C. at 147, 694 S.E.2d at 747. We are unwilling to hold that it does. After all, there are other controlled

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substances that appear as a white or gray rock-like substance. *See, e.g., Nabors*, 365 N.C. at 308, 718 S.E.2d at 624; *State v. Hicks*, 243 N.C. App. 628, 630, 777 S.E.2d 341, 343 (2015); *State v. Mobley*, 206 N.C. App. 285, 292, 696 S.E.2d 862, 867 (2010); *State v. McNeil*, 165 N.C. App. 777, 779, 600 S.E.2d 31, 33 (2004), *aff'd*, 359 N.C. 800, 617 S.E.2d 271 (2005). And the drug paraphernalia seized from the hotel room can be used in connection with other controlled substances. *See, e.g., State v. Wiggins*, 185 N.C. App. 376, 380, 648 S.E.2d 865, 869 (2007); *State v. Muncy*, 79 N.C. App. 356, 358, 339 S.E.2d 466, 468 (1986).

Simply put, if we held that the State's evidence in this case was sufficient to show the seized substance was heroin "beyond a reasonable doubt," it likely would eliminate the need for scientifically valid chemical analysis in many—perhaps most—drug cases. This, in turn, would render our Supreme Court's holding in *Ward* largely irrelevant. This Court has no authority to undermine a Supreme Court holding in that way. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). If the *Bridges* line of cases warrants further expansion—and further eroding of *Ward*—that change in the law must come from the Supreme Court.

Applying *Ward* here, the State's evidence did not establish beyond a reasonable doubt that the seized substance was heroin. 364 N.C. at 147, 694 S.E.2d at 747. Thus, the State was required to present scientifically valid chemical analysis identifying the seized substance as heroin. *Id.* The State concedes it did not do so. Accordingly, the trial court should have granted Osborne's motion to dismiss for insufficient evidence.

[2] Because we rule in Osborne's favor on this issue, we need not address her remaining arguments concerning her conviction on the drug possession charge. Osborne also challenges her convictions for misdemeanor child abuse on the ground that "the indictments for misdemeanor child abuse allege that Ms. Osborne used 'heroin in the presence of the child.'" Osborne argues that the State was required to prove the seized substance was heroin to support these charges as well. We disagree. Unlike the drug possession charge, the misdemeanor child abuse charges did not require the State to present a chemical analysis proving the seized substance was heroin. The State's evidence, including the officers' discovery of Osborne unconscious from an apparent drug overdose; Osborne's admission that she used heroin; and the presence of drug paraphernalia consistent with heroin use in the hotel room occupied by Osborne and her children was sufficient to send these charges to the jury. Likewise, in light of the State's other evidence, the admission of the in-court field test of the seized substance—even if erroneous—was harmless and certainly did not rise to the level of plain error. *State*

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v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). We therefore find no error in the trial court's judgment on the misdemeanor child abuse charges.

Conclusion

For the reasons discussed above, we vacate the trial court's judgment on the possession of heroin charge and find no error in the trial court's judgment on the misdemeanor child abuse charges.

VACATED IN PART; NO ERROR IN PART.

Chief Judge McGEE and Judge CALABRIA concur.

STATE OF NORTH CAROLINA

v.

ANTHONY MARCELLIOUS TILGHMAN, DEFENDANT

No. COA17-1308

Filed 2 October 2018

1. Criminal Law—post-conviction DNA testing—materiality—sufficiency of showing

Defendant's request for post-conviction DNA testing did not entitle him to the appointment of counsel under N.C.G.S. § 15A-269(c) where he failed to carry his burden of proving DNA testing would be material to his claim of wrongful conviction by providing no more than conclusory statements that new technology would be more accurate and probative of the identity of the perpetrator.

2. Criminal Law—post-conviction inventory of evidence—adequacy of request

The trial court did not err in denying defendant's post-conviction motion for DNA testing prior to obtaining an inventory of biological evidence where defendant's accompanying motion to locate and preserve evidence did not include an actual request for an inventory as required by N.C.G.S. § 15A-268, and thus was not presented to the trial court for a ruling. While defendant's motion for DNA testing was itself sufficient to trigger an inventory of evidence pursuant to N.C.G.S. § 15A-269, there was no indication the custodial agency was served with that motion. Even if it was the trial court's burden to ensure service upon the agency, the court's denial of the motion

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for DNA testing was not in error where defendant failed to sufficiently allege materiality.

Appeal by Defendant from order entered 2 June 2017 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 16 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Rana M. Badwan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt B. Orsbon, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Anthony Marcellious Tilghman (“Defendant”) appeals from an order denying his *pro se* motion for postconviction DNA testing and to locate and preserve evidence. Defendant contends the trial court erred by: (1) denying his motion for DNA testing prior to ordering and receiving an inventory of all physical and biological evidence; and (2) denying his motion because he sufficiently established his entitlement to appointment of counsel. We dismiss in part and affirm in part.

I. Factual and Procedural History

On 8 September 2014, in accordance with a plea agreement, Defendant pled guilty to five counts of robbery with a dangerous weapon and four counts of second degree kidnapping. The trial court consolidated the charges and sentenced Defendant to two consecutive terms of 72 to 99 months imprisonment. Defendant did not appeal from his guilty pleas.

Three years later, on 13 March 2017, Defendant filed a motion for appropriate relief (“MAR”). On 14 March 2017, Defendant filed a *pro se* “Motion to Locate and Preserve Evidence” and “Motion for Post-Conviction DNA Testing” in Cabarrus County Superior Court. Defendant listed eighteen pieces of physical and biological evidence he desired to be tested and requested the court appoint him legal counsel to assist him in prosecuting the motions.

On 2 June 2017, the trial court entered an order denying both of Defendant’s motions.¹ The court found “Judge Kevin M. Bridges entered

1. The trial court labeled Defendant’s motions as one motion; however, the order addresses both of Defendant’s motions.

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an order disposing of the evidence.” The court also found “Defendant’s Motion is frivolous and no hearing is necessary. The Defendant’s Motion fails to set forth any credible basis in law or fact to support his requests.” Defendant timely filed written notice of appeal on 14 June 2017. After settlement of the record and the filing of briefs, Defendant filed a petition for writ of *certiorari* on 19 March 2018.

II. Jurisdiction

N.C. Gen Stat. § 15A-270.1 allows a defendant to “appeal an order denying the defendant’s motion for DNA testing” N.C. Gen. Stat. § 15A-270.1 (2017). *See also State v. Doisey*, 240 N.C. App. 441, 445-46, 770 S.E.2d 177, 180 (2015). Our case law allows a defendant to appeal a denial of the appointment of counsel supplemental to this DNA motion. *See State v. Gardner*, 227 N.C. App. 364, 366, 742 S.E.2d 352, 354 (2013). Thus, this Court has jurisdiction over Defendant’s arguments regarding his written request for DNA testing and appointment of counsel. As for Defendant’s appellate arguments regarding alleged failures to inventory evidence, we, in our discretion, grant Defendant’s petition for writ of *certiorari* should his notice of appeal be imperfect. N.C. R. App. P. 21 (2017).

III. Standard of Review

Our standard of review of a trial court’s denial of a motion for post-conviction DNA testing is “analogous to the standard of review for a motion for appropriate relief.” *Gardner*, 227 N.C. App. at 365, 742 S.E.2d at 354 (citation omitted). Findings of fact are binding on appeal if they are supported by competent evidence, and we review conclusions of law *de novo*. *State v. Turner*, 239 N.C. App. 450, 452, 768 S.E.2d 356, 358 (2015) (citation omitted). We also review whether the trial court complied with a statutory mandate, which is a question of law, *de novo*. *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (citation omitted).

IV. Analysis

Defendant’s appellate argument is two-fold: (1) the trial court erred by denying his motion for DNA testing because he was entitled to appointment of counsel; and (2) the trial court erred by denying his motion to DNA testing prior to obtaining an inventory of evidence.

A. Entitlement to Appointment of Counsel

[1] Defendant argues the court erred in denying his motion because N.C. Gen. Stat. § 15A-269 entitles him to appointment of counsel.

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N.C. Gen. Stat. § 15A-269 states:

the court shall appoint counsel for the person who brings a motion under this section if that person is indigent. If the petitioner has filed pro se, the court shall appoint counsel for the petitioner in accordance with the rules adopted by the Office of Indigent Defense Services *upon a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction.*

N.C. Gen. Stat. § 15A-269(c) (2017) (emphasis added).

Our case law places the burden of proof to show materiality on the moving party. To meet this burden, a moving defendant must allege “more than the conclusory statement that the ability to conduct the requested DNA testing is material to the defendant’s defense.” *Gardner*, 227 N.C. App. at 369, 742 S.E.2d at 356 (quotation marks and alterations omitted) (citing *State v. Foster* 222 N.C. App. 199, 205, 729 S.E.2d 116, 120 (2012)). Merely asserting conclusory statements that DNA testing could be material to the defense and, if tested, would exonerate defendant are insufficient meet this burden. *See Turner*, 239 N.C. App. at 455-56, 768 S.E.2d at 359 (holding defendant’s assertion “[t]he ability to conduct the requested DNA testing is material to [his] defense” was conclusory and, therefore, insufficient to establish materiality under the statute); *Gardner*, 227 N.C. App. at 369-70, 742 S.E.2d at 356 (holding a defendant who pled guilty to fifteen counts of statutory rape failed to meet his burden of materiality when he used a standardized form which provided no space to include an explanation of materiality for DNA testing).

In this case, Defendant entered a guilty plea and did not present any defense to the trial court. Recently, our Court acknowledged a guilty plea increases a defendant’s burden to show materiality. *See State v. Randall*, ___ N.C. App. ___, ___, 817 S.E.2d 219, ___, slip op. at *4 (N.C. Ct. App. June 5, 2018) (acknowledging “the inherent difficulty in establishing the materiality required by N.C. Gen. Stat. § 15A-269 for a defendant who pleaded guilty[.]”). However, the Court stated it did “not believe that the statute was intended to completely forestall the filing of such a motion where a defendant did, in fact, enter a plea of guilty.” *Id.* at ___, 817 S.E.2d at ___, slip op. at *4. “The trial court is obligated to consider the facts surrounding a defendant’s decision to plead guilty in addition to other evidence, in the context of the entire record of the case, in order to determine whether the evidence is ‘material.’ ” *Id.* at ___, 817 S.E.2d at ___, slip op. at *4-*5 (citation omitted).

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Defendant's statements of materiality are indistinguishable from *Gardner* and *Turner*. Defendant asserted in his motion for DNA testing the "evidences need to be tested and preserved for the purpose of DNA testing where the results would prove that the Defendant was NOT the perpetrator of the crimes allegedly committed[.]" Defendant further argued he was intoxicated and under the influence of drugs, he never participated in the crime, and he was coerced to take the plea deal and "the DNA results would prove it." Additionally, Defendant maintains the items listed "[w]ere not subject to DNA testing, and today's technology would allow the testing of DNA provide results that are significantly more accurate and probati[ve] of the identity of the perpetrator in which, will exonerate Defend[a]nt."

Defendant asserts these statements taken together meet his evidentiary burden and are not merely conclusory statements. We conclude otherwise and hold the aggregation of Defendant's conclusory statements communicates the same conclusory effect. *See State v. Collins*, 234 N.C. App. 398, 411-12, 761 S.E.2d 914, 922-23 (2014) (holding defendant's statements, in both his *pro se* motion and amended affidavit, concerning "DNA [e]xperts," a "new technique known as 'Touch DNA[.]" and the ability to subject items to "newer and more accurate testing which would provide results that are significantly more accurate and probative" were each conclusory on their own merit, and, thus, defendant failed to meet the materiality burden under the statute).

Defendant's assertions are incomplete. He provided no information suggesting how new testing is different and more accurate. "Without more specific detail from Defendant, or some other evidence, the trial court [cannot] adequately determine whether additional testing would be significantly more accurate and probative[.]" *Id.* at 412, 761 S.E.2d at 923. Accordingly, and in light of Defendant's guilty plea, we hold Defendant failed to meet his burden of showing materiality under N.C. Gen. Stat. § 15A-269(c).² We affirm this portion of the trial court's order denying Defendant's motion.

2. The trial court's order is devoid of an explicit mention of materiality. Defendant did not bring forth any appellate argument regarding the lack of specific findings or conclusions of law addressing N.C. Gen. Stat. § 15A-269. It is not the role of this Court to make arguments for appellants. *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role of the appellate courts . . . to create an appeal for an appellant."). Nonetheless, we address this issue, as it may have frustrated our appellate review.

In *Gardner*, our Court did not require specific findings of fact or conclusions of law in the trial court's order denying defendant's motion for postconviction DNA testing. Our Court concluded the trial court's order was sufficient based on the following: (1) the court's statement it reviewed the allegations in defendant's motion; (2) the court citing

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B. Denial of Defendant's Motion Prior to an Inventory of Evidence

[2] Defendant argues the trial court erred in “summarily denying his motion” for a complete inventory of all physical and biological evidence relating to his case. Defendant asks this Court to remand the matter to the trial court who would, in turn, reconsider Defendant’s motion “in light of that inventory[.]” Defendant requested an inventory of evidence pursuant to N.C. Gen. Stat. § 15A-268 (2017) and N.C. Gen. Stat. § 15A-269, and we address each statute in turn.

1. Inventory of Evidence Pursuant to N.C. Gen. Stat. § 15A-268

N.C. Gen. Stat. § 15A-268 states:

(a1) Notwithstanding any other provision of law and subject to subsection (b) of this section, a custodial agency shall preserve any physical evidence, regardless of the date of collection, that is reasonably likely to contain any biological evidence collected in the course of a criminal investigation or prosecution.

N.C. Gen. Stat. § 15A-269(b); (3) other findings; and (4) the court’s conclusion defendant failed to show the existence of any grounds for relief. 227 N.C. App. at 370, 742 S.E.2d at 356-57. In an unpublished decision, our Court extended the rule in *Gardner. State v. Cade*, No. COA14-785, 2015 WL 661171, at *2 (unpublished) (N.C. Ct. App. Feb. 17, 2015) (citation omitted). There, the order did not cite to N.C. Gen. Stat. § 15A-269. 2015 WL 661171, at *2. However, the order included a statement the trial court reviewed the motion, files, and applicable law. 2015 WL 661171, at *2. The trial court concluded there was no basis in law or fact for the motions, Defendant did not establish a viable claim, and there was no merit to the motion. 2015 WL 661171, at *2. Our Court held the trial court did not err by failing to include more specific findings of fact or conclusions of law. 2015 WL 661171, at *2. Moreover, in *State v. Cox*, our Court reviewed a trial court’s oral denial of defendant’s motion for preservation and inventory of evidence and postconviction DNA testing. 245 N.C. App. 307, 781 S.E.2d 865 (2016). Here, the trial court stated it “carefully” reviewed Defendant’s motion, the clerk’s file, and applicable law. Additionally, the court found, as stated *supra*, “Defendant’s Motion is frivolous[.]” Accordingly, even without a specific finding or conclusion of materiality, though it would be helpful to our appellate review, the lack thereof did not frustrate review.

Our appellate review, without remand, does not run afoul of our Court’s recent decision, *State v. Shaw*, ___ N.C. App. ___, 816 S.E.2d 248 (N.C. Ct. App. May 15, 2018). In *Shaw*, the trial court reviewed defendant’s motion for postconviction DNA testing as a motion for appropriate relief. *Id.* at ___, 816 S.E.2d at ___, slip op. at *2-*3. Because defendant failed to meet the requirements for a motion for appropriate relief, the court denied his motion. *Id.* at ___, 816 S.E.2d at ___, slip op. at *3. Because the court denied on grounds for motions of appropriate relief and did not address section 15A-269, our Court could not “determine whether defendant’s motion for post-conviction DNA testing was properly denied.” *Id.* at ___, 816 S.E.2d at ___, slip op. at *6. Consequently, we vacated the order and remanded for review “consistent with the provisions of N.C. Gen. Stat. § 15A-269.” *Id.* at ___, 816 S.E.2d at ___, slip op. at *5-*6.

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...

(a7) Upon *written request by the defendant*, the custodial agency *shall* prepare an inventory of biological evidence relevant to the defendant's case that is in the custodial agency's custody. If the evidence was destroyed through court order or other written directive, the custodial agency shall provide the defendant with a copy of the court order or written directive.

N.C. Gen. Stat. § 15A-268(a1), (a7) (2017) (emphases added).

Under the plain language of the statute, custodial agencies are obligated to make an inventory of the biological evidence³ when a defendant makes a "written request." N.C. Gen. Stat. § 15A-268(a7). However, a request for location and preservation of evidence is not a request for an inventory of evidence. *Doisey*, 240 N.C. App. at 447-48, 770 S.E.2d at 181-82. Where a defendant does "not make any written request for an inventory . . . it follows that the trial court did not consider or rule on such a request." *Id.* at 448, 770 S.E.2d at 182. Accordingly, there is no ruling for this Court to review. *Id.* at 448, 770 S.E.2d at 182.

Here, Defendant's motion was not for an *inventory* of evidence. He titled his motion as a "Motion to Locate and Preserve Evidence[.]" (All capitalized in original). He requested an order "to Locate and Preserve any and all physical and biological evidence" and for DNA testing of the evidence. Thus, the trial court did not err in denying Defendant's motion for postconviction DNA testing prior to obtaining an inventory of biological evidence which Defendant never requested, and we must dismiss this argument. *See id.* at 447-48, 770 S.E.2d at 181-82.

Assuming *arguendo* Defendant properly requested an inventory of biological evidence, case law would bind us to dismiss this argument.⁴ Our Court recently addressed this issue in *State v. Randall*. In *Randall*, defendant requested "that the trial court require 'custodial law enforcement agency/agencies to inventory the biological evidence relating to his case.'" *Id.* at ___, 817 S.E.2d at ___, slip op. at *8 (emphasis and

3. N.C. Gen. Stat. § 15A-268 defines "biological evidence" as, *inter alia*, "any item that contains blood, semen, hair, saliva, skin tissue, fingerprints, or other identifiable human biological material . . ." N.C. Gen. Stat. § 15A-268(a) (2017).

4. In his motion, Defendant notes N.C. Gen. Stat. § 15A-268(a7) requires law enforcement to prepare an inventory of biological evidence. In his brief, Defendant asserts he was "independently entitled to an inventory of all biological evidence under § 15A-268(a7) because he specifically cited this provision in his motion requesting an inventory."

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alterations omitted). Although defendant asserted he requested an inventory from agencies, the record did not contain “evidence of these requests[.]” *Id.* at ___, 817 S.E.2d at ___, slip op. at *8-*9. Our Court held “[w]ithout evidence that [d]efendant made proper requests . . . and without any indication that the trial court considered the issue below” there was no ruling for this Court to review. *Id.* at ___, 817 S.E.2d at ___, slip op. at *9 (citation omitted). Accordingly, we dismissed defendant’s argument. Here, similar to defendant in *Randall*, the record is devoid of evidence Defendant made proper requests, and we would still dismiss this issue.

2. Inventory of Evidence Pursuant to N.C. Gen. Stat. § 15A-269

N.C. Gen. Stat. § 15A-269 states:

(f) Upon receipt of a motion for postconviction DNA testing, the custodial agency shall inventory the evidence pertaining to that case and provide the inventory list, as well as any documents, notes, logs, or reports relating to the items of physical evidence, to the prosecution, the petitioner, and the court.

N.C. Gen. Stat. § 15A-269(f). Unlike N.C. Gen. Stat. § 15A-268, a defendant need not make a request for an inventory of physical evidence. *Doisey*, 240 N.C. App. at 445, 770 S.E.2d at 180 (citation omitted). Instead, the custodial agency’s obligation to inventory evidence is triggered “[u]pon receipt of a motion for postconviction DNA testing[.]” N.C. Gen. Stat. § 15A-269(f). *See Doisey*, 240 N.C. App. at 445, 770 S.E.2d at 180. The statute is silent as to whether a defendant or the trial court bears the burden of serving the motion for inventory on the custodial agency.

Here, the record lacks proof either Defendant or the trial court served the custodial agency with the motion for inventory. Assuming *arguendo* it is the trial court’s burden to serve the custodial agency with the motion, any error by the court below is harmless error. As held *supra*, Defendant failed to meet his burden of showing materiality. Accordingly, the trial did not err by denying his motion for DNA testing prior to an inventory under N.C. Gen. Stat. § 15A-269(f).

V. Conclusion

For the foregoing reasons, we dismiss part of Defendant’s appeal and affirm the trial court’s order.

DISMISSED IN PART; AFFIRMED IN PART.

Judges ELMORE and ZACHARY concur.

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[261 N.C. App. 724 (2018)]

STATE OF NORTH CAROLINA

v.

JUHAROLD ZAEDWARD VANN

No. COA17-1158

Filed 2 October 2018

1. Appeal and Error—preservation of issues—motion in limine—argument not raised at trial

Defendant did not preserve for appeal the question of whether the trial court erred by failing to require the State to file a written pretrial motion to suppress where he did not raise the issue at trial.

2. Evidence—expert witness testimony—eyewitness identification

The trial court did not abuse its discretion by partially sustaining the State's objection to expert witness testimony on memory perception and eyewitness identification. The expert witness testified in a voir dire hearing that four factors were present that could affect the eyewitness identifications in this case, but the trial court ruled that two of them were such elementary, commonsense concepts and that expert testimony on those factors would be of no help to the jury.

3. Evidence—telephone conversation—Rule of Completeness

The trial court did not abuse its discretion in a prosecution for shooting a convenience store clerk by sustaining the State's objection to portions of defendant's jailhouse telephone call with his grandmother. Portions of the telephone call showing defendant's knowledge of the crime were admitted and defendant argued that other portions of the conversation should have been admitted under the Rule of Completeness. The trial court noted that admitting the additional evidence could open the door to admission of other clearly inadmissible parts of the conversation.

4. Appeal and Error—preservation of issues—Confrontation Clause—telephone conversation

Defendant waived a Confrontation Clause objection involving the authentication of a jailhouse telephone conversation where the objection was not renewed during cross-examination when defendant attempted to ask about a statement that had been ruled inadmissible.

Appeal by defendant from judgment entered 24 February 2017 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 September 2018.

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[261 N.C. App. 724 (2018)]

Attorney General Joshua H. Stein, by Special Deputy Attorney General David D. Lennon, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant-appellant.

TYSON, Judge.

Juharold Zaedward Vann (“Defendant”) appeals from judgment entered, following his jury’s conviction of assault with a deadly weapon with intent to kill inflicting serious injury. We find no error.

I. Factual Background

The State’s evidence tended to show on 11 August 2014, Mahmoud Albdoor (“Albdoor”) was working at his convenience store, “Southside Mart,” with his nephew, Jamil Swedat (“Swedat”). Shortly after 1:00 p.m., Defendant entered the Southside Mart and attempted to buy a cigar wrapper from Swedat, who stood at the cash register. Defendant did not have enough money to purchase the product, and Swedat refused to sell him the wrapper. Defendant became upset and began arguing with Swedat. After a brief argument with Swedat, Defendant knocked over a Slim Jim dehydrated jerky stick display on the counter, ran out of the store, and turned right upon exiting.

Albdoor testified he was also standing behind the counter, approximately five to six feet away from Defendant, and observed his entire altercation with Swedat. Albdoor identified Defendant as the person who had argued with Swedat on 11 August 2014. Defendant admitted to police officers he had engaged in a verbal altercation with Swedat and had knocked over a Slim Jim counter display at the Southside Mart.

Approximately one hour later, a man entered the Southside Mart with an orange shirt covering his face and fired four to five shots from a black handgun at Swedat, with one bullet striking him in the right side. Albdoor testified after the shooting stopped, he looked up from behind the counter and observed the side of the shooter’s face as he fled from the store. Albdoor testified the shooter ran towards the right upon exiting the Southside Mart, just as Defendant had done earlier that day. Albdoor also identified Defendant as the shooter.

Swedat gave a written statement to Charlotte-Mecklenburg Police Officer Quentin Blakeney on 11 August 2014 and identified Defendant as the individual who had shot him earlier that day. A redacted version of this statement was read to the jury. Because Defendant had gained

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weight, wore glasses, and “dressed nice” at trial, Swedat initially did not recognize Defendant in court. Swedat identified Defendant as the shooter on the second day of his testimony.

Charlotte-Mecklenburg Police Officer Timothy Kiefer testified on 17 August 2014, he responded to a call for service at 3463 Markland Drive in Charlotte, which was located approximately two hundred yards from the Southside Mart. Upon arrival, Officer Kiefer spoke with a resident of that address who had found a 9 millimeter handgun wrapped in a black and white striped Polo shirt and an orange T-shirt behind his trash cans. At trial, Kelly Shea, a DNA analyst with the Charlotte-Mecklenburg crime laboratory, testified that she was unable to obtain any useable DNA from either the pistol or the shirts.

Todd Nordhoff, a Charlotte-Mecklenburg crime laboratory firearm and toolmark examiner, was admitted as an expert in firearms and toolmark identification. Nordhoff testified the pistol recovered by Officer Kiefer was a Star semi-automatic pistol chambered for 9 millimeter Luger ammunition. Nordhoff further testified the four discharged shell cases recovered at the scene had been fired by that pistol.

Defendant testified at trial and admitted to arguing with Swedat and knocking over the Slim Jim counter display at the Southside Mart. Defendant denied being the gunman and testified that after the verbal altercation he went to his grandfather’s house at 2921 Markland Drive, which was located approximately ten minutes away from the Southside Mart. Defendant testified he asked his grandfather for a ride to Lexington, North Carolina, where Defendant had a job the next day. Fifteen minutes after arriving at his grandfather’s house, his grandfather took Defendant to a Wendy’s restaurant located approximately ten minutes away and then drove Defendant to Lexington.

The State sought to introduce, over Defendant’s objections, portions of a telephone conversation purportedly between Defendant and his grandmother recorded from the Mecklenburg County Jail on 1 September 2014. The trial court conferred with counsel and announced that it would sustain Defendant’s objections to certain portions of the telephone conversation.

A portion of the conversation allowed into evidence by the trial court included Defendant’s grandmother questioning him over whether the police had really found the gun or were merely just saying they had. Defendant argued to her the police officers must have the gun, because the gun had been found with the orange shirt and Polo shirt. Defendant added there was no way the police would have known the shirts were with the gun, unless the police had actually found them.

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Three days after the shooting, Defendant was arrested for assault with a deadly weapon with intent to kill inflicting serious injury and was subsequently indicted on the same charge on 2 September 2014. Defendant entered a plea of not guilty. On 24 February 2017, the jury returned a verdict of guilty of one count of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant was sentenced in the presumptive range to a minimum of 70 months and a maximum of 96 months imprisonment, with 512 days of credit for pre-sentence confinement.

Defendant gave notice of appeal in open court.

II. Jurisdiction

Jurisdiction of right lies in this Court by timely appeal from final judgment entered by the superior court, following a jury's verdict pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2017) and N.C. Gen. Stat. § 15A-1444(a) (2017).

III. Issues

Defendant asserts the trial court erred by (1) not requiring the State to file a suppression motion regarding Dr. Lori R. Van Wallendael's ("Dr. Van Wallendael") testimony; (2) partially sustaining the State's objection to Dr. Van Wallendael's testimony regarding the factors affecting the reliability of eyewitness identification; and, (3) excluding portions of Defendant's 1 September 2014 telephone conversation.

IV. Suppression Motion

[1] Defendant argues the trial court erred by failing to require the State to "file a written pre-trial motion to suppress or motion *in limine*, pursuant to [N.C. Gen. Stat. § 15-977.]" Defendant did not raise this argument at trial and has failed to preserve this argument for review on appeal.

Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts. . . . The defendant may not change his position from that taken at trial to obtain a steadier mount on appeal.

State v. Holliman, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (quotations omitted); see *State v. Monk*, 132 N.C. App. 248, 254, 511 S.E.2d 332, 336, *disc. review denied*, 350 N.C. 845, 539 S.E.2d 1 (1999) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating

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the *specific grounds* for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” (citation omitted)). Defendant failed to raise this argument at trial and cannot assert this argument for the first time on appeal. This assignment of error is dismissed.

V. Exclusion of Expert Witness Testimony

[2] Defendant argues the trial court erred by partially sustaining the State’s objection to expert testimony by a UNC-Charlotte professor, Dr. Lori Van Wallendael, regarding the factors affecting the reliability of eye-witness identification.

A. Standard of Review

“This court has held that the admission of expert testimony regarding memory factors is within the trial court’s discretion, and the appellate court will not intervene where the trial court properly appraises probative and prejudicial value of the evidence under Rule 403 of the Rules of Evidence.” *State v. Cotton*, 99 N.C. App. 615, 621, 394 S.E.2d 456, 459 (1990) (citing *State v. Knox*, 78 N.C. App. 493, 495-96, 337 S.E.2d 154, 156 (1985)). The Court in *Knox* stated the following standard for determining the admissibility of such testimony:

Expert testimony is properly admissible when it “can assist the jury to draw certain inferences from facts because the expert is better qualified.” The test for admissibility is whether the jury can receive “appreciable help” from the expert witness. Applying this test requires balancing the probative value of the testimony against its potential for prejudice, confusion, or undue delay. *See* N.C. Gen. Stat. 8C-1, Rule 403. Even relevant evidence may be excluded if its probative value is outweighed by the danger that it will confuse or mislead the jury. The court “is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony.”

Knox, 78 N.C. App. at 495, 337 S.E.2d at 156 (citations omitted).

This Court has also noted, “expert testimony on the credibility of a witness is inadmissible[.]” *State v. Davis*, 106 N.C. App. 596, 602, 418 S.E.2d 263, 267 (1992) (citations omitted). Our Supreme Court has held: “When the jury is in as good a position as the expert to determine an issue, the expert’s testimony is properly excludable because it is not helpful to the jury.” *Braswell v. Braswell*, 330 N.C. 363, 377, 410 S.E.2d 897, 905 (1991) (citation omitted).

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B. Analysis

Dr. Lori Van Wallendael was qualified and accepted by the court as an expert witness in the field of memory perception and eyewitness identification. Defendant sought to have Dr. Van Wallendael testify on his behalf concerning whether any factors were present that could have affected Albdoor's and Swedat's identifications of Defendant as the shooter. The State objected.

The trial court conducted a *voir dire* hearing to determine whether to admit or exclude Dr. Van Wallendael's testimony. Dr. Van Wallendael identified four factors in the present case which could have affected Albdoor's and Swedat's identifications of Defendant: (1) the time factor, (2) the disguise factor, (3) the stress factor, and (4) the weapon focus effect. *See generally* Hon. D. Duff McKee, *Challenge to Eyewitness Identification Through Expert Testimony*, 35 Am. Jur. Proof of Facts 3d 1, § 10 (1996 & Supp. 2018) (describing psychological factors affecting eyewitness identification).

Dr. Van Wallendael related that the time factor means the likelihood of an accurate identification increases the longer in time a witness has to view the perpetrator's face. For the second factor, a disguise refers to anything covering the face of the perpetrator, which decreases the chances of an accurate identification later by the eyewitness. The stress factor states that stress, especially from violent crimes, can significantly reduce an eyewitness's ability to remember accurately. Dr. Van Wallendael testified that studies on the weapon focus factor have shown people confronted with a weapon tend to concentrate their attention on the weapon itself, and not the individual holding the weapon, which decreases the likelihood of an accurate identification of the assailant or shooter later. Psychologists refer to this phenomenon as the weapon focus effect. *See id.*

After hearing arguments from both sides, the trial court sustained the State's objection to Dr. Van Wallendael's opinion testimony concerning the time and disguise factors. The trial court noted these two concepts "are such elementary, common sense conclusions that it would be of little if any benefit to the jury to hear someone purporting to be an expert to espouse those opinions."

The trial court, however, did allow Dr. Van Wallendael to testify on the stress factor and weapon focus effect, noting expert testimony on these two concepts "could be helpful to the jury." In addition, the trial court strongly admonished the defense and Dr. Van Wallendael not to express any opinion regarding the credibility or reliability of a witness.

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Defendant has failed to show any abuse of discretion by the trial court in partially sustaining the State's objection. The trial court properly found the time and disguise concepts were "common sense conclusions that . . . would be of little if any benefit to the jury" and excluded expert testimony on these two factors. *See Smith v. Pass*, 95 N.C. App. 243, 251, 382 S.E.2d 781, 786 (1989) ("Rule 702 permits a witness qualified as an expert to offer opinion testimony about his or her area of expertise *if the trier of fact determines such testimony would be helpful to the jury.*" (emphasis supplied)).

The trial court correctly found expert testimony on these two factors would be of little help to the jury and strongly admonished Dr. Van Wallendael not to express any opinion concerning the credibility or reliability of a witness, to prevent her testimony from invading the province of the jury. *See State v. Scott*, 323 N.C. 350, 353, 372 S.E.2d 572, 575 (1988) ("The credibility of the witnesses and the weight to be given their testimony is exclusively a matter for the jury." (citation omitted)).

After the State objected, the trial court excused the jury, conducted a *voir dire* examination of Dr. Van Wallendael to determine the substance of her testimony, and heard and considered arguments of counsel before partially sustaining the State's objection. The trial court did allow Dr. Van Wallendael to testify to both the stress factor and weapon focus effect, noting these two concepts "could be helpful to the jury." Defendant has not shown the trial court abused its discretion in partially sustaining the State's objection to Dr. Van Wallendael's testimony.

Although the trial court did not make a specific finding that the probative value of this admitted testimony outweighed its prejudicial effect, the procedure it followed demonstrates the trial court conducted its discretionary balancing test under Rule 403 and its ruling was "the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (citation omitted) ("A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision."). We defer to the trial court's exercise of discretion and its "reasoned decision." *Id.* Nothing in the trial court's ruling prevented Defendant from probing the time and disguise factors upon cross-examination of the State's witnesses and to bring forth and argue any asserted flaws and doubts in the victim's identification of Defendant as the perpetrator of the crime due to the length of time of the crime or the impact of any disguise the shooter wore. Defendant's argument is overruled.

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VI. Exclusion of Defendant's Telephone Conversation

[3] Defendant argues the trial court erred by allowing the State to offer portions of Defendant's 1 September 2014 telephone call with his grandmother into evidence, but refusing to allow Defendant to offer other portions from the same telephone call into evidence. Defendant asserts the exclusion of portions of the telephone call violated (1) the Rule of Completeness and (2) Defendant's constitutional "right to fully confront and cross-examine the witnesses against him."

A. Rule of Completeness

N.C. Gen. Stat. § 8C-1, Rule 106 (2017) codifies the common law Rule of Completeness and states: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

Our Supreme Court reviewed and addressed Rule 106 in *State v. Thompson* and noted North Carolina's rule is identical to the Federal rule, which has been interpreted and applied in many federal courts' decisions. 332 N.C. 204, 219, 420 S.E.2d 395, 403 (1992).

The Court in *Thompson* set out the following principles as our standard of review:

The lessons of the federal decisions discussing Rule 106 are well settled. Rule 106 codifies the standard common law rule that when a writing or recorded statement or a part thereof is introduced by any party, an adverse party can obtain admission of the entire statement or anything so closely related that in fairness it too should be admitted. *The trial court decides what is closely related. The standard of review is whether the trial court abused its discretion.* The purpose of the 'completeness' rule codified in Rule 106 is merely to ensure that a misleading impression created by taking matters out of context is corrected on the spot, because of the inadequacy of repair work when delayed to a point later in the trial.

Federal decisions also make [it] clear that Rule 106 does not require introduction of additional portions of the statement or another statement that are neither explanatory of nor relevant to the passages that have been admitted.

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Id. at 219-20, 420 S.E.2d at 403-04 (emphasis supplied) (citations and internal quotation marks omitted).

The admitted portions of the telephone conversation between Defendant and his grandmother tend to show Defendant possessed knowledge of the crime that only the shooter would know. Defendant sought to introduce an additional portion of the telephone conversation, in which Defendant's grandmother said "you didn't do it," and Defendant responded, "I know."

The State objected on grounds that the trial court had already ruled only the portion of the telephone conversation previously agreed upon by both parties was admissible, which did not include the above exchange. Defendant argued the door had been opened by the admission of the agreed-upon limited portion of the conversation to admit the proffered statements.

The trial court sustained the State's objection to the introduction of this portion of the conversation and noted if it ruled the agreed-upon portion of the conversation opened the door for any other part, that might be grounds for the State to demand admission of other clearly inadmissible parts of the conversation. Defendant's assertion that the trial court violated the Rule of Completeness and abused its discretion in sustaining the State's objection and excluding other portions of the 1 September 2014 telephone conversation is without merit.

This portion of the conversation admitted before the jury dealt largely with Defendant's explanation to his grandmother of the evidence the State had amassed against him. Defendant must demonstrate the statements concerning whether and how the police had actually found the gun were taken out of context when introduced into evidence. Defendant's exculpatory statement to his grandmother was "neither explanatory of nor relevant to" his admitted statements regarding whether the police found the gun. *See id.* Presuming Defendant's conversation evinces knowledge of the crime, Defendant did not admit to the crime during the conversation and his response, "I know," to his grandmother's statement was not explanatory of or relevant to his other discussion of the State's recovery and possession of the gun.

In excluding this portion of the telephone conversation, the trial court correctly expressed concerns that admission of this not agreed-upon portion of the telephone call could open the door to other portions of the conversation, which both parties had previously agreed were inadmissible. Defendant has failed to show the trial court abused its discretion when it sustained the State's objection to this portion of

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the 1 September 2014 telephone conversation. Defendant's arguments are overruled.

B. Confrontation Clause Claim

[4] Defendant contends it was reversible error for the trial court to exclude the aforementioned portion of the 1 September 2014 telephone call because it violated his constitutional right to fully confront and cross-examine the witnesses against him. *See* U.S. Const. amend. VI; N.C. Const. art. I, § 23. Defendant has failed to preserve this issue for appeal.

1. Standard of Review

Our Supreme Court has stated:

It is well established that a defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. It follows that in order for an appellant to assert a constitutional or statutory right on appeal, the right must have been asserted and the issue raised before the trial court. In addition, it must affirmatively appear on the record that the issue was passed upon by the trial court.

State v. McDowell, 301 N.C. 279, 291, 271 S.E.2d 286, 294 (1980) (citations omitted).

2. Analysis

Defendant referenced the Confrontation Clause briefly in his objection to authentication of the 1 September 2014 telephone conversation. The trial court and parties conferred and the trial court partially sustained the Defendant's objection. After the trial court ruled that certain portions of the telephone conversation would be inadmissible, Defendant's counsel stated, "I'm fine with the other portion." Mecklenburg County Sheriff's Office Sergeant Thomas Shields then testified to the authenticity of the recorded phone conversation and the agreed-upon portions were played before the jury.

Later during cross-examination of Sergeant Shields, Defendant attempted to question Sergeant Shields about the statement counsel had previously agreed, and the court had ruled, to be inadmissible. The State objected. The trial court heard arguments from both sides and sustained the State's objection. During this exchange, defense counsel did not specifically assert Defendant's rights under the Confrontation Clause.

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Defendant's failure to raise the Confrontation Clause here is a waiver of these rights. *See id.*; *see also Monk*, 132 N.C. App. at 254, 511 S.E.2d at 336 (" 'In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the *specific grounds* for the ruling the party desired the court to make if the specific grounds were not apparent from the context.' " (citation omitted)). This argument is dismissed.

VII. Conclusion

Defendant failed to preserve for review procedural issues regarding the State's objection to Dr. Van Wallendael's testimony. The trial court did not abuse its discretion by partially sustaining the State's objection to Dr. Van Wallendael's testimony regarding the commonsense time and disguise factors presumably affecting the reliability of eyewitness identification. Defendant was free to probe these factors from the State's witnesses and argue to the jury.

The trial court also did not abuse its discretion by excluding portions of Defendant's 1 September 2014 jailhouse telephone conversation with his grandmother, after review, agreement and consent of counsel. Defendant failed to renew or preserve for review constitutional issues on the exclusion of the aforementioned conversation. Defendant received a fair trial, free from prejudicial errors he preserved and argued. *It is so ordered.*

NO ERROR.

Judges INMAN and BERGER concur.

STATE v. WARDRETT

[261 N.C. App. 735 (2018)]

STATE OF NORTH CAROLINA

v.

CALEB E. WARDRETT, DEFENDANT

No. COA17-1418

Filed 2 October 2018

1. Appeal and Error—preservation of issues—juror presence at charge conference—sufficiency of record

Defendant failed to provide sufficient information for appellate review of his argument that a juror who entered the courtroom during the jury charge conference in defendant's trial for possession of a firearm by a felon heard information that deprived defendant of a unanimous jury verdict. The scant facts in the transcript, without a supplemental narrative to provide context, were not enough to overcome the presumption that the court proceedings were correct and regular where they merely showed that the courtroom clerk noticed a juror entering the courtroom, the judge took notice of the juror, and then instructed counsel to proceed with the charge conference.

2. Criminal Law—prosecutor's closing argument—name-calling—propriety

During closing argument at defendant's trial for possession of a firearm by a felon, the prosecutor's reference to defendant as one of a number of "fools" who participated in an altercation during which defendant fired a gun did not constitute an improper attack on defendant but was a fair commentary, based on the evidence, regarding reckless behavior.

3. Criminal Law—prosecutor's closing argument—personal belief of evidence—propriety

During closing argument at defendant's trial for possession of a firearm by a felon, the prosecutor improperly vouched for the truthfulness of the State's witnesses, but the statements were not grossly improper warranting a new trial, because the prosecutor made the statements to show the witnesses' relationships with defendant and how the witnesses tended to corroborate one another.

4. Criminal Law—prosecutor's closing argument—personal belief of guilt—propriety

During closing argument at defendant's trial for possession of a firearm by a felon, the prosecutor improperly stated that defendant was "absolutely guilty," but the statements did not deprive

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defendant of a fair trial where they followed the prosecutor's evaluation of the strength of the State's witnesses and did not suggest any perceived personal knowledge of the prosecutor.

5. Criminal Law—prosecutor's closing argument—matters outside the record—propriety

During closing argument at defendant's trial for possession of a firearm by a felon, the prosecutor did not improperly summarize a sequence of events involving defendant giving his gun to a friend to hide by saying defendant told his friend "man, get rid of this." Even though the phrase was not a direct quote, it represented a fair inference arising from the testimony.

6. Criminal Law—prosecutor's closing argument—accountability to community—propriety

During closing argument at defendant's trial for possession of a firearm by a felon, the prosecutor's statements that the jurors should take into account the community's concerns and asking them to "handle this unfinished business" were not improper because they did not suggest the jury would be held accountable to the community's demands, but rather involved commonly held beliefs and were an attempt to motivate the jury to reach a just result.

Appeal by Defendant from judgment entered 25 May 2017 by Judge J. Carlton Cole in Nash County Superior Court. Heard in the Court of Appeals 23 August 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Victoria L. Voight, for the State.

Warren D. Hynson for Defendant.

INMAN, Judge.

Caleb E. Wardrett ("Defendant") appeals his conviction following a jury verdict finding him guilty of possession of a firearm by a felon. After careful review of the record and applicable law, we conclude that Defendant failed to submit an adequate record on appeal to support his challenge to the unanimity of the jury verdict. We also reject Defendant's argument that the prosecutor's comments during closing argument were so grossly improper that the trial court should have intervened absent objection.

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[261 N.C. App. 735 (2018)]

Procedural and Factual Background

The evidence presented at trial tended to show the following:

On the night of 27 September 2014, Alberta Jones (“Alberta”) hosted a party at her house in Rocky Mount with family, friends, and neighbors attending. Shortly before 1:00 a.m., just outside of Alberta’s house, Defendant’s cousin, Anthony Austin (“Anthony”), and Ricky Jones (“Ricky”) engaged in an argument over whether Ricky had given Anthony fake money. Defendant participated in the quarrel, causing Ricky to retrieve his shotgun from his home, which was nearby, because he knew Defendant likely had a gun. When Ricky returned with his shotgun, Defendant pointed his gun at Ricky and ordered Ricky to drop the shotgun. Defendant then fired his own gun in the air several times. Robert Earl Jones (“Robert”), Ricky’s uncle, urged Defendant and Ricky to stop arguing. Alberta then called the police.

Before the police arrived, Defendant gave his gun to a friend, Ronaldo Wesson (“Ronaldo”), who took the gun to a house across the street owned by his uncle, Joseph “JoJo” McClain (“JoJo”), and stowed the gun under the mattress in JoJo’s bedroom. Rocky Mount Police Officer William Spikes and Officer Judd (collectively “the Officers”) responded to the gunshot call. Defendant left the area before the Officers arrived. No witness was willing to say who had fired a gun. The Officers did not find Defendant’s gun or Ricky’s shotgun, but they found gun shell casings near the area where Defendant, Anthony, and Ricky had been quarreling.

After the Officers left, Anthony struck Ricky, who then shot and killed Anthony. About five minutes after the Officers left from responding to the first gunshot call, they received another call to Alberta’s house, where they returned and found Ricky walking on the road away from the house, shotgun in hand. The Officers arrested Ricky.

Detectives Darius Hudgins and John Denton (collectively “the Detectives”) arrived to investigate the homicide. Defendant, who had returned to Alberta’s house by the time the Detectives arrived, agreed to go to the police station to give a statement, but he never followed up.

Both Ricky and Robert told the Detectives that it was Defendant who had fired the gun that prompted the first call to police. JoJo guided the Detectives to the gun that was hidden under the mattress at the behest of Defendant, and Ronaldo told the Detectives that Defendant had given him the gun to hide.

The gun the Detectives retrieved from beneath the mattress was a Smith & Wesson 9 millimeter handgun with an extended clip. The shell

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casings found by the Officers following the first call were not tested to determine whether they were from that gun, nor were any fingerprints found on the gun. But among the 23 bullets found within the gun—the extended clip could hold a maximum of 30—five had “the same manufacturer, color and caliber of what was found” on the ground by Alberta’s house.

A warrant was issued for Defendant’s arrest on 27 September 2014. He was eventually located and arrested in Norfolk, Virginia.

At the close of the State’s evidence, defense counsel moved to dismiss the charge, and the trial court denied the motion. Defendant did not present evidence. The jury found Defendant guilty of possession of a firearm by a felon. The trial court sentenced Defendant to minimum of 19 months and maximum of 32 months in prison, with credit for time served in pre-trial custody. Defendant timely appealed.

Analysis

I. Unanimous Jury Verdict

[1] Defendant’s first argument concerns a juror entering the courtroom during the jury charge conference on the flight instruction. The trial transcripts reflects the following:

MADAM COURT REPORTER: Judge, –

MR. TUCKER: – details.

MADAM COURT REPORTER: – there’s a juror. There’s a juror coming in.

THE COURT: Thank you, Madam Court Reporter. I saw her. I [sic] didn’t even dawn on me. You may continue.

Defendant contends that, because the juror entered the courtroom during the charge conference and possibly became privy to information outside the presence of the other jurors, Defendant’s right to a unanimous jury verdict, pursuant to N.C. Const. Art. I, § 24, was violated. We will not consider this issue because Defendant did not provide a sufficient record to allow meaningful appellate review.

“It is the appellant’s responsibility to make sure that the record on appeal is complete and in proper form.” *Miller v. Miller*, 92 N.C. App. 351, 353, 374 S.E.2d 467, 468 (1988). When a defendant is faced with an incomplete transcript, he can reconstruct the relevant portions through a written narrative. *See* N.C. R. App. P. 9(c)(1) (“Parties shall use [narrative] form or combination of forms best calculated under

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the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum expense to the litigants.”); *id.* 9(a)(3)(e) (“The record on appeal in criminal actions shall contain: so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal”). Here, the transcript is devoid of any information beyond the lone juror’s entrance into the courtroom during the charge conference. The record is silent as to whether the juror proceeded past the courtroom door. The trial court’s statement “You may continue” suggests that the juror immediately exited the courtroom. After this statement by the trial court, defense counsel continued with her argument, rather than objecting, which also suggests that the juror did not remain in the courtroom. Defendant relies solely on the transcript portion above and has not submitted a supplemental narrative to provide context for the alleged error. Review of this matter would require speculation as to the length of time the juror was in the courtroom and information he or she might have overheard.

There is a “longstanding rule [] that there is a presumption in favor of regularity and correctness in proceedings in the trial court, with the burden on the appellant to show error.” *L. Harvey & Son Co. v. Jarman*, 76 N.C. App. 191, 195-96, 333 S.E.2d 47, 50 (1985). When “the appellant presents evidence to rebut such a presumption, [we] will not turn a deaf ear to that evidence.” *Coppley v. Coppley*, 128 N.C. App. 658, 663, 496 S.E.2d 611, 616 (1998). Defendant has not produced any evidence overcoming that presumption. The transcript indicates only that the courtroom clerk noticed that a juror was entering the courtroom during the charge conference, that the trial court took notice, and that the trial court then instructed counsel to proceed with the charge conference. Defendant has failed to show that the juror remained in the courtroom or that the trial court erred with respect to that juror.

The short dialogue during the charge conference is insufficient for us to review this issue. Because Defendant “has made no attempt to reconstruct the evidence,” *In re Bradshaw*, 160 N.C. App. 677, 681, 587 S.E.2d 83, 86 (2003), and has not demonstrated that he did not have the means to compile such a narration, *In re Clark*, 159 N.C. App. 75, 80, 582 S.E.2d 657, 660 (2003), we dismiss this issue.

II. Prosecutor’s Closing Argument

Next, Defendant argues that the trial court should have intervened *ex mero motu* during closing arguments because the prosecutor’s statements were grossly improper. Although some of the prosecutor’s

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statements were improper, we conclude they were not so improper as to deprive Defendant of a fundamentally fair trial.

North Carolina General Statute § 15A-1230(a) provides:

During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice.

N.C. Gen. Stat. § 15A-1230(a) (2015). The standard of review for alleged improper closing arguments absent timely objection “is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*.” *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002). Our review employs a two-step test: “(1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant’s right to a fair trial.” *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017). The burden is on the appellant to show a “reasonable possibility that, had the error[s] in question not been committed, a different result would have been reached at trial.” *Id.* at 185, 804 S.E.2d at 473 (quoting N.C. Gen. Stat. § 15A-1443(a) (2015)). When determining “whether the prosecutor’s remarks are grossly improper, the remarks must be viewed in context and in light of the overall factual circumstances to which they refer.” *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995).

A. Name-Calling

[2] Defendant argues that the trial court should have intervened when the prosecutor referred to Defendant as a “fool.” The prosecutor, after reminding jurors that Ricky had been prosecuted and convicted for killing Anthony, argued as follows: “But one of the problems we’ve got is this, and you all know it, is these fools on the streets with guns. One of the fools was on the street that night. We’ve got one fool left. I’m asking you, are you going to handle this unfinished business for me?”

Because defense counsel did not object at trial, Defendant cannot obtain relief unless he demonstrates that the prosecutor’s words were improper *and* “extreme and calculated to prejudice the jury.” *State v. Thompson*, 188 N.C. App. 102, 110, 654 S.E.2d 814, 820 (2008). Considering the context of the argument, we conclude that the prosecutor’s use of the term “fool” was not improper.

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In *State v. Nance*, 157 N.C. App. 434, 442-43, 579 S.E.2d 456, 461-62 (2003), we held that it was improper for the prosecutor to call the defendant a “liar.” In *State v. Hamlet*, 312 N.C. 162, 173, 321 S.E.2d 837, 845 (1984), our Supreme Court held that it was improper for the prosecutor to call the defendant an “animal” and his neighborhood a “jungle.” In each case, the defendant failed to prove that the prosecutors’ statements were prejudicial. *Nance*, 157 N.C. App. at 442-43, 579 S.E.2d at 462; *Hamlet*, 312 N.C. at 173, 321 S.E.2d at 845.

In *State v. Jones*, 355 N.C. 117, 133-34, 558 S.E.2d 97, 107-08 (2002), our Supreme Court reversed the defendant’s conviction and death sentence and ordered a new trial because a prosecutor repeatedly called the defendant a “quitter,” “loser,” and “lower than the dirt on a snake’s belly.” The argument was so grossly improper, the Supreme Court held, that the trial court deprived the defendant of a fair trial by not intervening, even in the absence of an objection by defense counsel. *Id.* at 134, 558 S.E.2d at 108. The Court reasoned that the argument “improperly [led] the jury to base its decision not on the evidence relating to the issues submitted, but on misleading characterizations, crafted by counsel, that are intended to undermine reason in favor of visceral appeal.” *Id.* at 134, 558 S.E.2d at 108.

Here, unlike in *Jones*, the prosecutor’s remarks related to the gun fight that had occurred and did not single out Defendant as a “fool,” but compared him to other “fools” who behave recklessly with firearms. The prosecutor did not make repeated ad hominem attacks on Defendant like the prosecutor in *Jones*.

Reviewing the closing argument as a whole, the prosecutor’s reference to Defendant as a “fool” was not “calculated to lead the jury astray,” but was simply a fair commentary based upon the evidence. *Id.* at 133, 558 S.E.2d at 108. It was not improper for the prosecutor to declare Defendant a “fool” based on evidence that he intervened in an argument between two other people, pointed a loaded firearm at Ricky, discharged the firearm, and enlisted help to hide the firearm, all while being a convicted felon. In contrast to the terms used in *Nance*, *Hamlet*, and *Jones*, while calling someone a “fool” is not a compliment, it was not abusive or otherwise improper in the context of the evidence presented in this case. Though one might disagree with the prosecutor’s phrasing, it does not render his argument improper.

B. Personal Belief of the Evidence

[3] Defendant next argues that the trial court should have intervened because the prosecutor expressed his belief as to the veracity of the

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witnesses. Defendant points to the following italicized portions of the State's closing argument:

First off, he tried to suggest to you that these people that the State presented to you are not telling the truth. Ask yourself what reason there might be for that. You watched them all testify. This person is like family to them, this Defendant. *What reason would they have to falsely come in here, falsely come in here, and say that he committed this offense.* Was any of that suggested to you while they were being cross-examined? I didn't hear it.

. . . .

The other reason that I'm telling you that these witnesses are telling the truth about it is think about the one thing that Ricky Jones and Robert Earl Jones mentioned about the gun. The two of them said one distinguishing characteristic about is that it had a long clip in it. Remember them saying that? Well, when this clip is in this gun you can see right here it will extend from that gun while it's loaded. It will be obvious even while you're holding it like you're going to fire it that it has a long clip in it. . . . Now, at the time Ricky Jones said that and Robert Earl Jones said that to – to law enforcement about it, they couldn't possibly have known that that very gun was going to [be] pulled out of JoJo's house. So, how did they know that gun had a long clip in it unless they really saw the Defendant with it? They're telling the truth about it, because they saw it happen and because the Defendant frankly did it. Period, the end.

(emphasis added). Looking at the statements in context and through the totality of the circumstances, the prosecutor's statements, while improper, were not grossly improper and do not merit reversal of Defendant's conviction.

Prosecutors cannot personally vouch for their witnesses, but can "argue that the State's witnesses are credible." *State v. Augustine*, 359 N.C. 709, 725, 616 S.E.2d 515, 528 (2005). The current factual background is akin to facts reviewed by our Supreme Court in *State v. Wiley*, 355 N.C. 592, 565 S.E.2d 22 (2002) and *State v. Wilkerson*, 363 N.C. 382, 683 S.E.2d 174 (2009). In *Wiley*, the defendant argued that, because the prosecutor's case leaned heavily on witness testimony, his comments regarding the witnesses' truthfulness were grossly improper. *Wiley*, 355 N.C.

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at 622, 565 S.E.2d at 43. The Supreme Court held the comments were not improper because, rather than expressing his personal opinion, the prosecutor was merely “giving the jury reasons to believe the state’s witnesses who had given prior inconsistent statements and were previously unwilling to cooperate with investigators.” *Id.* at 622, 565 S.E.2d at 43.

In *Wilkerson*, the prosecutor impermissibly told the jury that a witness was telling the truth. *Wilkerson*, 363 N.C. at 425-26, 683 S.E.2d at 200. The Supreme Court held that the comment violated N.C. Gen. Stat. § 5A-1230(a), but that it was not grossly improper. *Id.* at 425, 683 S.E.2d at 200.

In this case, the prosecutor was attempting to bolster the credibility of the witnesses by showing the relationship they had with Defendant and how they tended to corroborate with one another. The prosecutor pointed out that the witnesses knew Defendant “to the level of family,” which would make their testimony all the more credible. The prosecutor also noted that Ricky and Robert both testified as to the extended clip attached to the gun that Defendant possessed. Their testimony, the prosecutor argued, was all the more credible because Ricky and Robert did not know that the same gun was given to Ronaldo and hidden under JoJo’s mattress. The prosecutor went too far when he asserted that the witnesses were “telling the truth about it, because they saw it happen and because the Defendant frankly did it.” However, while the prosecutor’s statements were improper because they expressly vouched for the truthfulness of the witnesses, they were not so grossly improper to warrant a new trial.

C. Personal Belief of Defendant’s Guilt

[4] Defendant contends that the court failed to intervene when the prosecutor proclaimed that Defendant was “absolutely guilty of the crime he’s charged with” and that “[t]here’s just no question about it.” The prosecutor’s statements were improper, but we conclude that they did not deprive Defendant of his right to a fair trial.

In *State v. Waring*, 364 N.C. 443, 500, 701 S.E.2d 615, 651 (2010), the defendant argued that the prosecutor injected his own personal opinion as to the defendant’s guilt by stating “I believe the evidence is overwhelming that the defendant is guilty of first degree felony murder.” Our Supreme Court rejected that argument and held that it is not grossly improper to discuss a defendant’s culpability when the prosecutor’s argument relates “the strength of the evidence to the theories under which [the] defendant [is] prosecuted” and in verdict sheets presented to the jury. *Id.* at 500, 701 S.E.2d at 651.

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In this case, the prosecutor declared Defendant guilty, but only after reviewing the elements of felony gun possession and the evidence presented by the State. The prosecutor focused on the issues that were in question and what defense counsel would likely argue. The prosecutor's statement that Defendant was guilty followed his assessment of the strength of the State's witnesses, and did not suggest perceived personal knowledge. Thus, as stated in *Waring*, though the prosecutor's statements were "obviously improper," they did not rise to the level that required the trial court to intervene independently. *Id.* at 500, 701 S.E.2d at 651.

D. Matters Unsupported by the Evidence

[5] Defendant posits that the prosecutor made arguments on matters outside the record and unsupported by the evidence when he remarked that Defendant told Ronaldo to "man, get rid of this"—this being the gun. The prosecutor's statement in this regard was not improper.

Prosecutors are "given wide latitude in the scope of their argument," *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007) (citation omitted), and may argue any "inference[] that reasonably can be drawn from the evidence presented." *State v. Anderson*, 175 N.C. App. 444, 453, 624 S.E.2d 393, 400 (2006). So long as the argument is "consistent with the record and does not travel into the fields of conjecture or personal opinion," the argument is not improper. *State v. Madonna*, __ N.C. App. __, __, 806 S.E.2d 356, 362 (2017) (quoting *State v. Small*, 328 N.C. 175, 184-85, 400 S.E.2d 413, 419 (1991)).

Ronaldo testified that Defendant gave him the gun and Detective Hudgins testified that Ronaldo told police that Defendant gave him the gun. Though Ronaldo did not say that Defendant expressly stated "man, get rid of this," the prosecutor's assertion fairly summarized the evidence and argued a reasonable inference arising from the testimony.

E. Accountability to Community

[6] Defendant's last argument is that the prosecutor impermissibly advocated that the jury's accountability to its community should compel a guilty verdict. Defendant takes issue with the following italicized portion of the State's closing argument:

What I really represent is people. . . . These people are -- some of them are known to you, your friends, your neighbors, your employers, co workers, that kind of thing. . . . The reason I represent them is because they have a right

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to know that when things like this happen, that the right thing happens in this courtroom. . . .

This kind of behavior that the Defendant exhibited on this particular night is dangerous. . . . *It causes people to have negative conclusions about this place in which we all live.* It could possibly potentially hurt or kill someone. . . .

But he did do it himself and it is important for that reason to *my clients if you will, which is the State of North Carolina* for what they are, living, breathing people. The people who live here. . . . *This case matters to them.* Therefore, I hope it matters to you. . . .

I'm asking you, are you going to handle this unfinished business for me?

(emphasis added). The above statements were not improper.

A prosecutor can argue that a jury is the “voice and conscience of the community,” *State v. Brown*, 320 N.C. 179, 204, 358 S.E.2d 1, 18 (1987), and “may also ask the jury to ‘send a message’ to the community regarding justice.” *State v. Barden*, 356 N.C. 316, 367, 572 S.E.2d 108, 140 (2002). A prosecutor must not ask or embolden the jury to “lend an ear to the community,” such that the jury is speaking for the community or acting for the community’s desires. *Id.* at 367, 572 S.E.2d at 140.

The statements here were standard opinions and assertions of fact that did not suggest the jury would be held accountable to the community. In *State v. Rogers*, 323 N.C. 658, 662 63, 374 S.E.2d 852, 855-56 (1989), our Supreme Court held there was no error in the prosecutor’s argument that the community deserved to be safe, drug-free, and that young people should be warned about drug abuse. The Court concluded that such public policy opinions are widely held and are not improper. *Id.* at 663, 374 S.E.2d at 856. Here, the prosecutor stated he represented North Carolina and that the people of the State were essentially his clients. Defendant’s alleged conduct adversely affected the community at large. The prosecutor argued that people in the community deserve to have justice occur in the courtroom. He argued that he hoped this case mattered enough to the jury to render a just conclusion. These remarks by the prosecutor were proper because they involved commonly held beliefs and merely attempted to motivate the jury to come to an appropriate conclusion, rather than to achieve a result based on the community’s demands.

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We are equally unpersuaded that the prosecutor's statement regarding "unfinished business" unfairly pressured the jury to curb a societal ill. In *Barden*, the prosecutor argued—over defense counsel's objection—that the jury would be doing a "disservice" to the community if the defendant was not sentenced to death. *Barden*, 356 N.C. at 367-68, 572 S.E.2d at 140-41. Our Supreme Court concluded that "the prosecutor did not contend that the community demanded defendant's execution," but instead asked the jury not to do a disservice to the community and concluded that the trial court did not abuse its discretion. *Id.* at 368, 572 S.E.2d at 141.

The same holds true in this case. The prosecutor did not urge that society or the community wanted Defendant punished, but requested, based on the evidence, the jury make an appropriate decision. Even assuming that the statement was improper, it was not grossly improper. Unlike in *Barden*, defense counsel in this case did not object at trial. Defendant cannot show a reasonable possibility that the result would have been different had the prosecutor not made the statement.

Conclusion

While we reject Defendant's arguments, we do not condone remarks by prosecutors that exceed statutory and ethical limitations. Derogatory comments, epithets, stating personal beliefs, or remarks regarding a witness's truthfulness reflect poorly on the propriety of prosecutors and on the criminal justice system as a whole. Prosecutors are given a wide berth of discretion to perform an important role for the State, and it is unfortunate that universal compliance with "seemingly simple requirements" are hindered by "some attorneys intentionally 'push[ing] the envelope' with their jury arguments." *Jones*, 355 N.C. at 127, 558 S.E.2d at 104. But, because Defendant has failed to overcome the high burden to prove that these missteps violated his due process rights, he is not entitled to relief.

NO ERROR.

Judges TYSON and BERGER concur.

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TOWN OF PINEBLUFF, PLAINTIFF

v.

MOORE COUNTY, CATHERINE GRAHAM IN HER CAPACITY AS A COUNTY COMMISSIONER,
NICK PICERNO IN HIS CAPACITY AS A COUNTY COMMISSIONER, OTIS RITTER, IN HIS CAPACITY AS
A COUNTY COMMISSIONER, RANDY SAUNDERS IN HIS CAPACITY AS A COUNTY COMMISSIONER, AND
JERRY DAEKE IN HIS CAPACITY AS A COUNTY COMMISSIONER, DEFENDANTS

No. COA17-286

Filed 2 October 2018

Zoning—extraterritorial jurisdiction—conflicting legislative action

The trial court properly entered summary judgment for plaintiff (Pinebluff) and issued a writ of mandamus ordering defendant (Moore County) to adopt a resolution authorizing Pinebluff's exercise of its extraterritorial jurisdiction. The case arose from a conflict between a law of general application, N.C.G.S. § 160A-360, and a local act, Session Law 1999-35, which abrogated the requirement of county approval. If reading a statutory scheme as a whole produces an irreconcilable conflict, the most recent provision should control and the session law was the most recent enactment.

Appeal by Defendants from Order granting summary judgment and writ of mandamus for Plaintiff entered 30 November 2016 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 20 September 2017.

Northen Blue, LLP, David M. Rooks, for plaintiff-appellee.

Misty Randall Leland, Moore County Attorney, for defendants-appellants.

MURPHY, Judge.

The disagreement between these local governments can be traced to a conflict between a law of general application and a local bill: North Carolina's extraterritorial jurisdiction statute (codified at N.C.G.S. § 160A-360) and a local act pertaining to the exercise of territorial jurisdiction by the Town of Pinebluff (Senate Bill 433 enacted in 1999 as Session Law 1999-35). Between 2014-2015, Pinebluff sought to expand its extraterritorial jurisdiction and, pursuant to the aforementioned local act, informed Moore County of its intent to do so. Moore County refused to adopt a resolution authorizing Pinebluff's extraterritorial jurisdiction

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expansion and cited the above General Statute in support of its position. Pinebluff then sued Moore County and sought a writ of mandamus to compel the County Commissioners to approve the town's proposed extraterritorial jurisdiction expansion. The trial court ruled in favor of Pinebluff and entered an order directing the Moore County Commissioners to approve Pinebluff's extraterritorial jurisdiction expansion.

We conclude that the local act, codified in N.C. Session Law 1999-35, abrogated the requirement of county approval and requires Moore County to summarily approve any otherwise lawful extraterritorial jurisdiction expansion request by Pinebluff. As a result, we affirm the trial court's order granting summary judgment and writ of mandamus.

BACKGROUND

Pinebluff is a municipal corporation located in Moore County. The underlying facts are not in dispute, but the parties dispute the construction of N.C.G.S. § 160A-360 as a result of N.C. Session Law. 1999-35 as it pertains to Pinebluff's extraterritorial zoning jurisdiction.

Pinebluff adopted an ordinance extending its corporate limits that became effective on 19 July 2007. On 16 October 2014, Pinebluff adopted a resolution to extend its ETJ into a portion of Moore County as authorized by N.C.G.S. § 160A-360(a). On 28 October 2014, Pinebluff sent a copy of the 16 October 2014 resolution to the Chairman of the Moore County Commissioners, requesting that the County adopt an appropriate resolution allowing Pinebluff to exercise extraterritorial jurisdiction within two miles of the limits of the 19 July 2007 annexation. In its request, Pinebluff indicated that N.C. Session Law 1999-35, a local bill modifying N.C.G.S. § 160A-360 with respect to Pinebluff, required the County to adopt such a resolution.

Defendants did not reply to Pinebluff's first request. Pinebluff sent a second request on 18 February 2015. In response, the Chairman of the County Commissioners met with Pinebluff's Mayor, along with the parties' respective staff and counsel. Defendants indicated their belief that S.L. 1999-35 did not obligate them to approve the request because the session law is subject to restriction by N.C.G.S. § 160A-360(e), which was not amended and must be read in harmony with the entire statute.

N.C.G.S. § 160A-360, as modified by S.L. 1999-35, provides:

(a) All of the powers granted by this Article may be exercised by any city within its corporate limits. In addition, any city may exercise these powers within a defined area extending not more than one mile beyond its limits. With

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the approval of the board or boards of county commissioners with jurisdiction over the area, a city of 10,000 or more population but less than 25,000 may exercise these powers over an area extending not more than two miles beyond its limits and a city of 25,000 or more population may exercise these powers over an area extending not more than three miles beyond its limits. The boundaries of the city's extraterritorial jurisdiction shall be the same for all powers conferred in this Article. No city may exercise extraterritorially any power conferred by this Article that it is not exercising within its corporate limits. In determining the population of a city for the purposes of this Article, the city council and the board of county commissioners may use the most recent annual estimate of population as certified by the Secretary of the North Carolina Department of Administration. *The Town of Pinebluff may exercise the powers granted by this Article for a distance not more than two miles beyond its corporate limits, without regard to the population limit of this section.*

(a1) Any municipality planning to exercise extraterritorial jurisdiction under this Article shall notify the owners of all parcels of land proposed for addition to the area of extraterritorial jurisdiction, as shown on the county tax records. The notice shall be sent by first-class mail to the last addresses listed for affected property owners in the county tax records. The notice shall inform the landowner of the effect of the extension of extraterritorial jurisdiction, of the landowner's right to participate in a public hearing prior to adoption of any ordinance extending the area of extraterritorial jurisdiction, as provided in G.S. 160A-364, and the right of all residents of the area to apply to the board of county commissioners to serve as a representative on the planning board and the board of adjustment, as provided in G.S. 160A-362. The notice shall be mailed at least four weeks prior to the public hearing. The person or persons mailing the notices shall certify to the city council that the notices were sent by first-class mail, and the certificate shall be deemed conclusive in the absence of fraud.

(b) Any council wishing to exercise extraterritorial jurisdiction under this Article shall adopt, and may amend

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from time to time, an ordinance specifying the areas to be included based upon existing or projected urban development and areas of critical concern to the city, as evidenced by officially adopted plans for its development. Boundaries shall be defined, to the extent feasible, in terms of geographical features identifiable on the ground. A council may, in its discretion, exclude from its extraterritorial jurisdiction areas lying in another county, areas separated from the city by barriers to urban growth, or areas whose projected development will have minimal impact on the city. The boundaries specified in the ordinance shall at all times be drawn on a map, set forth in a written description, or shown by a combination of these techniques. This delineation shall be maintained in the manner provided in G.S. 160A-22 for the delineation of the corporate limits, and shall be recorded in the office of the register of deeds of each county in which any portion of the area lies.

(c) Where the extraterritorial jurisdiction of two or more cities overlaps, the jurisdictional boundary between them shall be a line connecting the midway points of the overlapping area unless the city councils agree to another boundary line within the overlapping area based upon existing or projected patterns of development.

(d) If a city fails to adopt an ordinance specifying the boundaries of its extraterritorial jurisdiction, the county of which it is a part shall be authorized to exercise the powers granted by this Article in any area beyond the city's corporate limits. The county may also, on request of the city council, exercise any or all these powers in any or all areas lying within the city's corporate limits or within the city's specified area of extraterritorial jurisdiction.

(e) No city may hereafter extend its extraterritorial powers under this Article into any area for which the county at that time has adopted and is enforcing a zoning ordinance and subdivision regulations and within which it is enforcing the State Building Code. However, the city may do so where the county is not exercising all three of these powers, or when the city and the county have agreed upon the area within which each will exercise the powers conferred by this Article.

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(f) When a city annexes, or a new city is incorporated in, or a city extends its jurisdiction to include, an area that is currently being regulated by the county, the county regulations and powers of enforcement shall remain in effect until (i) the city has adopted such regulations, or (ii) a period of 60 days has elapsed following the annexation, extension or incorporation, whichever is sooner. During this period the city may hold hearings and take any other measures that may be required in order to adopt its regulations for the area. *When the Town of Pinebluff annexes any area outside its corporate limits thus extending the area over which it would be allowed under subsection (a) of this section to exercise the powers granted by this Article, upon presenting proper evidence to the County Board of Commissioners that the annexation has been accomplished, the County Board of Commissioners shall adopt a resolution authorizing the Town to exercise these powers within the extended area thus described.*

(f1) When a city relinquishes jurisdiction over an area that it is regulating under this Article to a county, the city regulations and powers of enforcement shall remain in effect until (i) the county has adopted this regulation or (ii) a period of 60 days has elapsed following the action by which the city relinquished jurisdiction, whichever is sooner. During this period the county may hold hearings and take other measures that may be required in order to adopt its regulations for the area.

(g) When a local government is granted powers by this section subject to the request, approval, or agreement of another local government, the request, approval, or agreement shall be evidenced by a formally adopted resolution of that government's legislative body. Any such request, approval, or agreement can be rescinded upon two years' written notice to the other legislative bodies concerned by repealing the resolution. The resolution may be modified at any time by mutual agreement of the legislative bodies concerned.

(h) Nothing in this section shall repeal, modify, or amend any local act which defines the boundaries of a city's

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extraterritorial jurisdiction by metes and bounds or courses and distances.

(i) Whenever a city or county, pursuant to this section, acquires jurisdiction over a territory that theretofore has been subject to the jurisdiction of another local government, any person who has acquired vested rights under a permit, certificate, or other evidence of compliance issued by the local government surrendering jurisdiction may exercise those rights as if no change of jurisdiction had occurred. The city or county acquiring jurisdiction may take any action regarding such a permit, certificate, or other evidence of compliance that could have been taken by the local government surrendering jurisdiction pursuant to its ordinances and regulations. Except as provided in this subsection, any building, structure, or other land use in a territory over which a city or county has acquired jurisdiction is subject to the ordinances and regulations of the city or county.

(j) Repealed by Session Laws 1973, c. 669, s. 1.

(k) As used in this subsection, “bona fide farm purposes” is as described in G.S. 153A-340. As used in this subsection, “property” means a single tract of property or an identifiable portion of a single tract. Property that is located in the geographic area of a municipality’s extraterritorial jurisdiction and that is used for bona fide farm purposes is exempt from exercise of the municipality’s extraterritorial jurisdiction under this Article. Property that is located in the geographic area of a municipality’s extraterritorial jurisdiction and that ceases to be used for bona fide farm purposes shall become subject to exercise of the municipality’s extraterritorial jurisdiction under this Article. For purposes of complying with 44 C.F.R. Part 60, Subpart A, property that is exempt from the exercise of extraterritorial jurisdiction pursuant to this subsection shall be subject to the county’s floodplain ordinance or all floodplain regulation provisions of the county’s unified development ordinance.

(l) A municipality may provide in its zoning ordinance that an accessory building of a “bona fide farm” as defined by G.S. 153A-340(b) has the same exemption from the building

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code as it would have under county zoning as provided by Part 3 of Article 18 of Chapter 153A of the General Statutes.

This subsection applies only to the City of Raleigh and the Towns of Apex, Cary, Fuquay-Varina, Garner, Holly Springs, Knightdale, Morrisville, Rolesville, Wake Forest, Wendell, and Zebulon.

N.C.G.S. § 160A-360 (emphasis added); S.L. 1999-35.

Defendants maintain that, under N.C.G.S. § 160A-360, they were not required to approve Pinebluff's request because Moore County adopted and is enforcing a zoning ordinance and subdivision regulations and is enforcing the State Building Code within Pinebluff's proposed extraterritorial expansion area. Based on the premise that S.L. 1999-35 does not invalidate N.C.G.S. § 160A-360(e) as applied to Pinebluff, Defendants informed Pinebluff that it would have to obtain Defendants' approval to extend its extraterritorial jurisdiction, which requires Pinebluff go through Defendants' public hearing process as defined in Moore County's Unified Development Ordinance.

In accordance with Moore County's Unified Development Ordinance, Moore County's Planning Board held a public hearing and recommended that Defendants deny the extension request. The Planning Board noted that no one at the meeting spoke in favor of the request. The Board of Commissioners later held a public hearing before voting on the request and observed that no one spoke in favor of the request and that nine people spoke against it. The Board of Commissioners voted 5-0 to deny Pinebluff's request.

On 21 January 2016, Pinebluff filed a *Complaint and Petition for Writ of Mandamus* against Defendants, arguing that S.L. 1999-35 required Defendants to approve their extension request. Defendants filed an *Answer, Motion to Dismiss and Motion for Judgment on the Pleadings Pursuant to N.C. Rules of Civil Procedure 12(b)(6) and 12(c)*. Later, Pinebluff filed a motion for summary judgment with a contemporaneously filed affidavit. After a hearing, the trial court entered an order allowing Pinebluff's motion for summary judgment and petition for writ of mandamus and denying Defendants' motion to dismiss and motion for judgment on the pleadings. The order directed Defendants "to adopt a resolution authorizing [Pinebluff] to exercise its extraterritorial zoning jurisdiction within the area [Pinebluff] requested in its resolution adopted October 16, 2014." Defendants timely appealed.

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ANALYSIS

Defendants argue that the trial court erred in granting Pinebluff's motion for summary judgment and issuing a writ of mandamus.¹ After careful examination of the statute as amended and consideration of the canons of construction applicable here, we affirm the trial court's disposition of this matter.

Defendants interpret N.C.G.S. § 160A-360(a) and S.L. 1999-35 to require that Pinebluff obtain Defendants' approval to extend its extra-territorial jurisdiction beyond one mile. Defendants also contend that N.C.G.S. § 160A-360(e), notwithstanding N.C.G.S. § 160A-360(f) as amended by S.L. 1999-35, prohibits Pinebluff from extending its extra-territorial jurisdiction into an area where Moore County is exercising all three powers set out in N.C.G.S. § 160A-360(e).

As Pinebluff and Defendants dispute the construction of S.L. 1999-35, we must determine whether, by adopting S.L. 1999-35, the General Assembly intended to require Moore County to rubber stamp any resolutions authorizing Pinebluff to exercise its extraterritorial zoning jurisdiction upon Pinebluff's presentation of proper evidence of annexation, even if Moore County is exercising all three powers listed in N.C.G.S. § 160A-360(e). After examining the statute and enactment of S.L. 1999-35, we agree with Pinebluff and hold that the General Assembly intended to remove all discretion from Moore County to oppose an extension of Pinebluff's extraterritorial jurisdiction.

We review an order granting summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). Summary judgment is only appropriate when the record demonstrates that "there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Id.* (quoting N.C.G.S. § 1A-1, N.C. R. Civ. P. 56(c)).

1. Defendants have attempted to appeal the denial of the motion to dismiss and motion for judgment on the pleadings. However, we note that neither of these issues are appealable. *See Whitaker v. Clark*, 109 N.C. App. 379, 427 S.E.2d 142 (1993) (finding that generally, appeal from denial of a motion for judgment on the pleadings "does not lie" with the Court of Appeals absent an interlocutory appeal that affects a substantial right); *Drain v. United Servs. Life Ins. Co.*, 85 N.C. App. 174, 176, 354 S.E.2d 269, 271 (1987) ("[W]here an unsuccessful motion to dismiss is grounded on an alleged insufficiency of the facts to state a claim for relief, and the case thereupon proceeds to judgment on the merits, the unsuccessful movant may not on an appeal from the final judgment seek review of the denial of the motion to dismiss."). Accordingly, the only issue on appeal is whether summary judgment was properly granted for Pinebluff.

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In ensuring that the legislative intent is accomplished, “we are guided by the structure of the statute and certain canons of statutory construction.” *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). Our Supreme Court has previously observed that “[s]tatutory interpretation properly begins with an examination of the plain words of the statute.” *Lanvale Props., LLC v. Cty. of Cabarrus*, 366 N.C. 142, 154, 731 S.E.2d 800, 809-10 (2012) (quoting *Three Guys Real Estate v. Harnett Cty.*, 345 N.C. 468, 472, 480 S.E.2d 681, 683 (1997)). “Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.” *N.C. DOT v. Mission Battleground Park, DST*, __ N.C. __, __, 810 S.E.2d 217, 222 (2018) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012)).

We “presume[] that the Legislature acted with full knowledge of prior and existing law.” *See Ridge Cmty. Inv’rs, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977). Moreover, “[a]mendments are presumed not to be without purpose.” *Pine Knoll Shores v. Evans*, 331 N.C. 361, 366, 416 S.E.2d 4, 7 (1992). When only part of a statute is amended, we view the unmodified provisions “simply as a reenactment, except as to the new provision, which is to take effect from the time of the amendment.” *State v. Mull*, 178 N.C. 748, 752, 101 S.E. 89, 91 (1919).

Although the *in pari materia* canon of statutory interpretation clearly applies to the interpretation of conflicting provisions within different statutes that address the same subject matter, *State ex rel. Comm’r of Ins. v. N.C. Fire Insurance Rating Bureau*, 292 N.C. 70, 76, 231 S.E.2d 882, 886 (1977), its principles along with the whole-text canon guide us when there is a conflict between two provisions of the same statute. If reading a statutory scheme as a whole produces an “irreconcilable conflict,” by which two conflicting provisions cannot be given independent meaning, the more recent provision should control. *See Greensboro v. Guilford Cty.*, 191 N.C. 584, 588, 132 S.E. 558, 559 (1926) (“It is well settled that a special or local law repeals an earlier general law to the extent of any irreconcilable conflict between their provisions, or speaking more accurately, it operates to engraft on the general statute an exception to the extent of the conflict.”) (quoting *25 Ruling Case Law* 929 (William M. McKinney & Burdett A. Rich eds., 1919)).

Here, the text of S.L. 1999-35 makes clear that the General Assembly intended to replace § 160A-360(a) and § 160A-360(f) with the modified provisions in S.L. 1999-35, while leaving the rest of N.C.G.S. §160A-360

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intact. Once we read the statute as a whole and combine S.L. 1999-35 with the unmodified portion of N.C.G.S. § 160A-360, two of the provisions conflict with each other: N.C.G.S. § 160A-360(e) prohibits a city's exercise of extraterritorial jurisdiction within an area where the county is exercising the three powers enumerated therein, whereas N.C.G.S. § 160A-360(f) as amended by S.L. 1999-35 provides that Moore County "shall adopt a resolution authorizing [Pinebluff] to exercise these powers within the extended area thus described." S.L. 1999-35 is silent about the applicability or inapplicability of N.C.G.S. § 160A-360(e) to the specific authorization for Pinebluff in N.C.G.S. § 160A-360(f). Defendants' favored interpretation focuses on the commands of N.C.G.S. § 160A-360(e), whereas Pinebluff argues that N.C.G.S. § 160A-360(f) invalidates the effect that N.C.G.S. § 160A-360(e) otherwise would have on Pinebluff's proposed exercise of extraterritorial jurisdiction.

For the following reasons, we conclude that there is an "irreconcilable conflict" between N.C.G.S. § 160A-360(e) and N.C.G.S. § 160A-360(f) as applied to Pinebluff. *See State v. Hutson*, 10 N.C. App. 653, 657, 179 S.E.2d 858, 861 (1971) ("Statutes *in pari materia*, although in apparent conflict or containing apparent inconsistencies, should, as far as reasonably possible, be construed in harmony with each other so as to give force and effect to each . . ."). However, here, it is not possible to construe these provisions in harmony with one another.

N.C.G.S. § 160A-360(a), as modified by S.L. 1999-35, provides that Pinebluff need not meet the population requirement to exercise extraterritorial jurisdiction for up to two miles beyond its corporate limits.² A town of Pinebluff's size could otherwise exercise extraterritorial jurisdiction only within one mile beyond its corporate limits. N.C.G.S. § 160A-360(a) ("[A]ny city may exercise these powers within a defined area extending not more than one mile beyond its limits. With the approval of the board or boards of county commissioners with jurisdiction over the area, a city of 10,000 or more population but less than 25,000 may exercise these powers over an area extending not more than two miles beyond its limits . . ."). Defendants contend that Pinebluff must still obtain its approval to exercise extraterritorial jurisdiction in the areas more than one mile beyond Pinebluff's corporate limit.

Defendants' interpretation is inconsistent with the plain language of S.L. 1999-35. S.L. 1999-35 provides that "[t]he Town of Pinebluff may

2. "The Town of Pinebluff may exercise the powers granted by this Article for a distance not more than two miles beyond its corporate limits, without regard to the population limit of this section." S.L.1999-35 (emphasis in original).

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exercise the powers granted by this Article for a distance not more than two miles beyond its corporate limits, without regard to the population limit of this section.” N.C.G.S. § 160A-360(a) contains a provision by which cities of more than 10,000 people but fewer than 25,000 may extend their extraterritorial jurisdiction for up to two miles with approval from the county commissioners. However, the approval process in this provision is not required here because S.L. 1999-35 exempts Pinebluff from the population requirement that is otherwise a prerequisite in the process of extending the boundaries of a city’s extraterritorial jurisdiction without county approval.

On its own, N.C.G.S. § 160A-360(a) as amended by S.L. 1999-35 does not imply that Pinebluff enjoys unrestricted exercise of its extraterritorial jurisdiction within two miles of its corporate limits. Because the General Assembly did not modify N.C.G.S. § 160A-360(e) in S.L. 1999-35, N.C.G.S. § 160A-360(e) limits the application of N.C.G.S. § 160A-360(a). Our Supreme Court has recognized that N.C.G.S. § 160A-360(e) prohibits a city’s exercise of extraterritorial jurisdiction in an area where the county is exercising the three enumerated functions—even if a city seeks extraterritorial jurisdiction *within* the one-mile limit provided by N.C.G.S. § 160A-360(a). *See Town of Boone v. State*, 369 N.C. 126, 128 n.1, 794 S.E.2d 710, 712 n.1 (2016) (“Even when a municipality wishes to exercise extraterritorial jurisdiction in an area within one mile of its corporate limits, county approval is required if the county is already enforcing zoning ordinances, subdivision regulations, and the State Building Code in that area.”). In other words, even though a city does not otherwise need the county’s approval to exercise its extraterritorial jurisdiction within one mile³ of its corporate limits under N.C.G.S. § 160A-360(a), N.C.G.S. § 160A-360(e) acts as a limit on this authority under certain circumstances.

If S.L. 1999-35 contained only the above modification to N.C.G.S. § 160A-360(a), the existence of N.C.G.S. § 160A-360(e) in the general statutory scheme would clearly demonstrate that Defendants retain the discretion to follow their own discretion and/or consider the will of their constituents as expressed at a hearing under N.C.G.S. § 160A-360(a1) and disapprove of Pinebluff’s request to exercise extraterritorial jurisdiction

3. N.C.G.S. § 160A-360(a) provides that “any city may exercise these powers within a defined area extending not more than one mile beyond its limits.” In other cases, a city’s exercise of extraterritorial jurisdiction does not require county approval unless N.C.G.S. § 160A-360(e) applies. Here, because of S.L. 1999-35, Pinebluff has authority to exercise its extraterritorial jurisdiction for up to two miles beyond its corporate limits without Moore County’s approval.

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within the two-mile boundary provided by N.C.G.S. § 160A-360(a). If S.L. 1999-35 amended only N.C.G.S. § 160A-360(a), the potential additional mile of extraterritorial jurisdiction would not affect our application of our Supreme Court's observation in *Town of Boone*, where the Court recognized that N.C.G.S. § 160A-360(a) is subject to N.C.G.S. § 160A-360(e). *See Town of Boone*, 369 N.C. at 128 n.1, 794 S.E.2d at 712 n.1.

However, the General Assembly also amended the language of N.C.G.S. § 160A-360(f) with S.L. 1999-35. Because "amendments are presumed not to be without purpose," we must determine how the amendment to N.C.G.S. § 160A-360(f) alters the town's or county's authority. *See Pine Knoll Shores*, 331 N.C. at 366, 416 S.E.2d at 7. Under Defendants' reading of N.C.G.S. § 160A-360(f), the modification to N.C.G.S. § 160A-360(f) serves to reinforce the General Assembly's above amendment to N.C.G.S. § 160A-360(a), which is unambiguous on its own. We are not persuaded by Defendants' reading of N.C.G.S. § 160A-360(f).

Because N.C.G.S. § 160A-360(a) clearly authorizes Pinebluff to exercise its extraterritorial jurisdiction within two miles of its corporate limit without county approval, subject to N.C.G.S. § 160A-360(e), the amendment to N.C.G.S. § 160A-360(f) must affect the scope of Defendants' discretion in some other way. The plain language of N.C.G.S. § 160A-360(f), as modified by S.L. 1999-35, is clear: Defendants do not retain the discretion to disapprove of Pinebluff's requests to exercise its extraterritorial jurisdiction within the two-mile limit authorized by the above alteration to N.C.G.S. § 160A-360(a). N.C.G.S. § 160A-360(f), as modified by S.L. 1999-35, provides that Pinebluff can exercise extraterritorial jurisdiction within two miles of its corporate limits, as allowed by N.C.G.S. § 160A-360(a), even if Moore County is exercising the three powers described in N.C.G.S. § 160A-360(e).

If N.C.G.S. § 160A-360(f) as amended did not operate to invalidate the discretion otherwise retained by Defendants under N.C.G.S. § 160A-360(e), N.C.G.S. § 160A-360(f) as amended would have no effect at all. As discussed above, N.C.G.S. § 160A-360(a) as amended by S.L. 1999-35 states that Pinebluff can exercise extraterritorial jurisdiction within two miles of its corporate limits, and our Supreme Court has interpreted N.C.G.S. § 160A-360(e) as a general exception to this authority. *See Town of Boone*, 369 N.C. at 128 n.1, 794 S.E.2d at 712 n.1. It follows that, where N.C.G.S. § 160A-360(e) *does not* apply, a city can exercise its extraterritorial jurisdiction within the limits set out by N.C.G.S. § 160A-360(a), and a county has no discretion to limit a city's otherwise lawful exercise of extraterritorial jurisdiction.

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As a result, even without N.C.G.S. § 160A-360(f) as amended by S.L. 1999-35, N.C.G.S. § 160A-360(a) authorizes Pinebluff to exercise its extraterritorial jurisdiction within two miles of its corporate limits where N.C.G.S. § 160A-360(e) does not apply. Defendants have no discretion to limit Pinebluff's exercise of extraterritorial jurisdiction where Moore County is not exercising the three powers described in N.C.G.S. § 160A-360(e). Because the General Assembly amended N.C.G.S. § 160A-360(f) in addition to N.C.G.S. § 160A-360(a), each must have independent meaning. N.C.G.S. § 160A-360(f) clearly removes some of Defendants' discretion to deny Pinebluff's requests to extend its extraterritorial jurisdiction, and N.C.G.S. § 160A-360(e) is the only source of such discretion.

Because N.C.G.S. § 160A-360(e) and N.C.G.S. § 160A-360(f) as amended by S.L. 1999-35 are inconsistent with one another, we must determine which provision controls here. "Where two statutes are thus in conflict and cannot reasonably be reconciled, the latter one repeals the one of earlier date to the extent of the repugnance." *Guilford Cty.*, 191 N.C. at 588, 132 S.E. at 559. (quoting *State v. Kelly*, 186 N.C. 365, 371-72, 119 S.E. 755, 759 (1923)). Although our Supreme Court in *Guilford County* managed to reconcile the conflicting provisions in that case, we have shown above that no such interpretation is tenable here. Therefore, we conclude that "the last enactment must prevail . . ." See *Guilford Cty. v. Estates Admin., Inc.*, 212 N.C. 653, 655, 194 S.E. 295, 296 (1937). The General Assembly enacted N.C.G.S. § 160A-360(e) in 1971. S.L. 1971-698. The General Assembly enacted S.L. 1999-35 in 1999. Accordingly, we hold that S.L. 1999-35's amendment of N.C.G.S. § 160A-360(f) operates to invalidate the applicability of N.C.G.S. § 160A-360(e) with regard to Pinebluff.

CONCLUSION

We conclude that S.L. 1999-35, being the most recent enactment, operates to invalidate the applicability of N.C.G.S. § 160A-360(e) with regard to Pinebluff. Therefore, Moore County did not have discretion to withhold passing a resolution regarding Pinebluff's extraterritorial jurisdiction. Accordingly, we affirm the trial court's entry of summary judgment in favor of Pinebluff and the writ of mandamus requiring Moore County to adopt a resolution authorizing Pinebluff to exercise its extraterritorial jurisdiction within the area identified by the 16 October 2014 Pinebluff resolution.

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

WATLINGTON v. DEP'T OF SOC. SERVS. ROCKINGHAM CTY.

[261 N.C. App. 760 (2018)]

GLORIA R. WATLINGTON, PETITIONER

v.

DEPARTMENT OF SOCIAL SERVICES ROCKINGHAM COUNTY, RESPONDENT

No. COA17-1176

Filed 2 October 2018

Public Officers and Employees—social services worker—dismissal—just cause

An administrative law judge correctly determined that a department of social services (respondent) had just cause to terminate the employment of a social services technician (petitioner) who provided transportation for children who were under the agency's supervision, supervised parental visits, and reported the details of visits to social workers. Petitioner accepted a gift of jewelry from a foster child through a parent, allowed parents and/or children to buy her food, bought items for herself using money intended for a child's group home, accepted cash from a parent, and gave a bassinet to a foster parent without permission. Petitioner was notified in a termination letter that respondent believed she had engaged in unacceptable personal conduct, and she was given an opportunity in a contested case hearing to dispute whether those specific acts occurred as a matter of fact and whether they constituted unacceptable personal conduct as a matter of law.

Appeal by Petitioner from Final Decision entered 12 July 2017 by Administrative Law Judge J. Randall May in the Office of Administrative Hearings. Heard in the Court of Appeals 7 March 2018.

Mark Hayes for Petitioner-Appellant.

Rockingham County Attorney's Office, by Emily Sloop, for Respondent-Appellee.

INMAN, Judge.

An administrative law judge did not err in concluding that a county social services worker's acts of misconduct—including borrowing money and accepting gifts from the parents of children in her care—constituted just cause for termination of her employment.

Petitioner Gloria R. Watlington ("Ms. Watlington") appeals from a final agency decision affirming the termination of her employment by

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the Rockingham County Department of Social Services (“RCDSS”). After careful review of the record and applicable law, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Ms. Watlington worked for RCDSS as a Community Social Services Technician from 2012 until she was fired on 15 December 2015. Her job responsibilities included transporting children under RCDSS supervision; supervising case visits by parents with children under RCDSS supervision; and reporting the details of such visits to social workers assigned to the cases.

When she was hired, Ms. Watlington was informed of the Rockingham County Personnel Policy, which included a provision prohibiting employees from accepting gifts or favors and engaging in other unacceptable personal conduct.

On 9 December 2015, Ms. Watlington was placed on administrative leave with pay after she disclosed to coworkers that she had accepted a gift at the conclusion of a case visit. Two days later, the director of RCDSS conducted a pre-disciplinary/dismissal conference attended by Ms. Watlington and her supervisor. On 14 December, RCDSS notified Ms. Watlington in writing that her employment was being terminated immediately based on five instances of “unacceptable personal conduct” in violation of the Rockingham County Personnel Policy. The notice cited the following conduct by Ms. Watlington: (1) accepting a gift of jewelry from a foster child through a parent; (2) allowing parents and/or children under her supervision to buy food for Ms. Watlington; (3) buying herself items using money intended to be provided to a child’s group home; (4) accepting a cash loan from a foster parent under her supervision; and (5) giving a bassinet to a foster parent without permission.

Ms. Watlington immediately appealed her termination. The next day, 15 December 2015, the County Manager upheld the termination and notified Ms. Watlington of his decision in a letter. Ms. Watlington timely filed a Petition for Contested Case Hearing with the North Carolina Office of Administrative Hearings.

Evidence and argument in the contested case were presented to Administrative Law Judge J. Randall May (“the ALJ”) on 23 May 2016. The ALJ issued a final decision on 5 July 2016 affirming the termination of Ms. Watlington’s employment but ordering RCDSS to pay her back pay for a procedural violation of the North Carolina Administrative Code.

Both parties appealed to this Court. In *Watlington v. Department of Social Services of Rockingham County*, __ N.C. App. ___, 799 S.E.2d

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396 (2017) (“*Watlington I*”), we affirmed the ALJ’s finding that Ms. Watlington had engaged in conduct as alleged by RCDSS and the ALJ’s conclusion that RCDSS could terminate Ms. Watlington’s employment only for just cause, but we otherwise concluded that the ALJ’s decision was in error.¹ We held that the ALJ had failed to make appropriate findings of fact or conclusions of law to allow appellate review of the just cause determination and remanded the matter for the ALJ to make such findings. We also reversed the ALJ’s award of back pay to Ms. Watlington and remanded for the ALJ to determine whether RCDSS violated procedure and, if it did, to order a remedy provided by the appropriate subchapter of the North Carolina Administrative Code.

The ALJ heard oral arguments on remand on 1 June 2017 and issued a final decision on remand on 12 July 2017. The final decision affirmed the termination of Ms. Watlington’s employment and concluded that RCDSS had not violated any procedural requirement in the process of firing her. Ms. Watlington timely appealed to this Court.

DISCUSSION

I. Standards of Review

Section 150B-51 of our General Statutes governs our standard of review of an administrative agency decision such as this. The statute provides different standards of review depending on the issues challenged on appeal. “[Q]uestions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency’s decision are reviewed under the whole-record test.” *N.C. Dep’t of Env’t & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894-95 (2004) (citation omitted). Factual findings that are not challenged on appeal are presumed to be supported by competent evidence and cannot be disturbed by this Court. *Blackburn v. N.C. Dep’t of Pub. Safety*, 246 N.C. App. 196, 210, 784 S.E.2d 509, 519 (2016); *see also N.C. State Bar v. Ely*, __ N.C. App. __, __, 810 S.E.2d 346, 351 (2018) (noting on whole-record review of an agency decision that “unchallenged findings are binding on appeal” (citation omitted)).

1. This Court in *Watlington I* held that the ALJ had incorrectly applied Subchapter J, of the North Carolina Administrative Code to Ms. Watlington’s appeal, because her employment was governed by Subchapter I. We reversed the ALJ’s conclusions of law and remanded for reconsideration, findings, and conclusions of law applying the correct subchapter.

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II. Analysis

In *Watlington I*, this Court held that the ALJ had correctly articulated a three-part test to determine whether RCDSS had just cause to terminate Ms. Watlington's employment. *Watlington I*, ___ N.C. App. at ___, 799 S.E.2d at 404. The test, established by this Court's decision in *Warren v. North Carolina Department of Crime Control and Public Safety*, 221 N.C. App. 376, 726 S.E.2d 920 (2012), requires the trial court to determine: (1) whether the employee engaged in the conduct alleged by the employer; (2) whether the conduct falls within one of the categories of unacceptable personal conduct provided in the North Carolina Administrative Code; and (3) whether the conduct "amounted to just cause for the disciplinary action taken." *Id.* at 382-83, 726 S.E.2d at 925.

Watlington I also held that the ALJ's final decision adequately addressed the first prong of the *Warren* test in its Finding of Fact 13, noting that because the finding was not disputed by either party, it is binding on appeal. *Watlington I*, ___ N.C. App. at ___, 799 S.E.2d at 404. On remand, the trial court made the same finding of fact, *verbatim*, which is also undisputed by either party and similarly binding here. *Blackburn*, 246 N.C. App. at 210, 784 S.E.2d at 519.

Finding of Fact 13 establishes the following:

While employed by [RCDSS], [Watlington] engaged in the following conduct: (1) accepted a loan in the amount of sixty dollars (\$60.00) offered by a foster parent between two (2) and three (3) years prior to her termination by [RCDSS]; (2) used approximately six dollars (\$6.00) of a minor child's money to purchase food for herself while transporting the minor child across the state at the request of her supervisor, which [Watlington] repaid to [RCDSS] within one (1) week; (3) consumed leftover food purchased by a foster parent for herself and a minor child when offered by the foster parent; (4) gifted a bassinet to a foster family being served by [RCDSS] from an area where [RCDSS] keeps both donations and property assigned to particular families under its supervision; [sic] and upon being notified of a problem, retrieved said bassinet and returned it to [RCDSS]; (5) accepted a slice of cake or cupcakes offered by a foster family at a minor child's birthday party; and (6) accepted a wrapped pair of earrings from a foster parent on behalf of her child, which was immediately returned upon issue [sic] raised by [RCDSS].

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The issues before us concern whether the undisputed misconduct, or any of it, falls within a category identified by the Administrative Code as unacceptable personal conduct, and if so, whether that unacceptable personal conduct justified termination of Ms. Watlington's employment, as opposed to lesser disciplinary action.

A. Unacceptable Personal Conduct

Title 25, Chapter 1, Subchapter I of the North Carolina Administrative Code identifies nine categories of unacceptable personal conduct. 25 N.C. Admin. Code 01I.2304(b)(1)-(9). The ALJ concluded that all but one incident of Ms. Watlington's misconduct fell within Category (4): "the willful violation of a known or written work rule." He further concluded that one or more other incidents fell within other categories of unacceptable personal conduct enumerated in 25 N.C. Admin. Code 01I.2304(b).²

Ms. Watlington argues that conclusions concerning other categories outside of "willful violation of known or written work rules," were improperly made, as the only punishable conduct cited in RCDSS's termination letter amounted to violations of the Rockingham County Personnel Policy. In order to dismiss a state employee in service to local government, the law requires agency management to provide the employee with "a written letter of dismissal containing the specific reasons for dismissal" following a pre-dismissal conference. 25 N.C. Admin. Code 1I.2308(4)(f). As Ms. Watlington construes the law and the termination letter, RCDSS failed to specify any grounds for termination beyond violation of a written rule, and the ALJ's conclusions of law that her conduct also fell within other categories of unacceptable personal conduct were beyond the scope of the proceeding. We disagree.

The termination letter describes, in detail, the "specific reasons for dismissal." 25 N.C. Admin. Code 1I.2308(f). The letter begins by stating that Ms. Watlington was dismissed "as a result of [her] unacceptable personal conduct." It then recounts the issues presented at the pre-dismissal conference:

During the conference, we discussed the following concerns:

- 1) Violation of Rockingham County Personnel Policy Article V, Conditions of Employment, Section 3, Gifts and Favors, Item (A) in that

2. These other categories were: (5) "conduct unbecoming an employee that is detrimental to the agency's service;" (6) "the abuse of client(s) . . . or a person(s) over whom the employee has charge or to whom the employee has a responsibility;" and (8) "insubordination."

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- The employee accepted a gift of jewelry from foster children/biological parent
 - The employee allowed parents/minor children in foster care to purchase the employee food and/or beverages on more than one occasion
 - The employee used money belonging to a child in foster care to purchase items for herself, knowing that the funds were the child's SSI monies intended for the group home.
 - The employee accepted cash monies from a foster parent.
- 2) Violation of Rockingham County Personnel Policy Article V, Conditions of Employment, Section 3, Gifts and Favors, Item (A) in that
- The employee, without permission, gifted a bassinet to a family being served by DSS

From there, the letter includes "Findings" that Ms. Watlington admitted to each specific act enumerated above, followed by the "Conclusion" that dismissal was in the best interest of Rockingham County. By stating in the letter that Ms. Watlington was being dismissed for "unacceptable personal conduct" and subsequently detailing which specific acts RCDSS considered to be within the meaning of that term, it complied with 25 N.C. Admin. Code 11.2308(f). The ALJ was subsequently permitted to make necessary conclusions of law as to whether and how the specific alleged acts amounted to "unacceptable personal conduct" within the meaning of 25 N.C. Admin. Code 11.2304(b).

Despite recitation of the specific acts constituting unacceptable personal conduct in the termination letter, Ms. Watlington posits that she was without sufficient notice to mount a defense as to any basis for dismissal beyond "willful violation of a known or written rule." The termination letter identified several written rules which Ms. Watlington had violated, but the express language she quotes in her appeal is derived from the Administrative Code and is not included in the termination letter.

She relies solely on an analogy to this Court's holding in *Timber Ridge v. Caldwell*, 195 N.C. App. 452, 672 S.E.2d 735 (2009), that a landlord wrongly terminated a lease without providing any notice of lease termination as required by the Code of Federal Regulations. 195 N.C. App. at 455, 672 S.E.2d at 737. Setting aside the significant difference

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in areas of law, *Timber Ridge* is inapposite because: (1) the record on appeal in that case did not include any notice from which this Court could determine compliance with the relevant law, *id.* at 455, 672 S.E.2d at 737; and (2) the language of the relevant statute required the notice to “ ‘state the reasons for the landlord’s action with enough specificity so as to enable the tenant to prepare a defense[,]’ ” *id.* at 453, 672 S.E.2d at 736 (quoting 24 C.F.R. § 247.4(a) (2008)), in marked difference to the language of the North Carolina Administrative Code provision pertinent to Ms. Watlington’s dismissal.

RCDSS notified Ms. Watlington in its termination letter that it believed she had engaged in “unacceptable personal conduct.” It then detailed the specific acts amounting to “unacceptable personal conduct,” consistent with 25 N.C. Admin. Code 01I.2308(4)(f). The contested case hearing before the ALJ afforded Ms. Watlington an opportunity to dispute whether those specific acts occurred as a matter of fact and whether they constituted unacceptable personal conduct as a matter of law. The ALJ, in turn, had full authority to conclude as a matter of law that Ms. Watlington’s conduct fell within one of the enumerated categories of unacceptable personal conduct. *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925. Because the ALJ concluded that each of the acts falling within the category of “willful violation of a known or written work rule” also fell within another category of unacceptable personal conduct, and Ms. Watlington does not argue that those other categories were in error outside of the procedural argument overruled above, we hold that the ALJ fully satisfied the second *Warren* prong. Likewise, because we hold that the second *Warren* prong was satisfied independent of Ms. Watlington’s “willful violation of a known or written work rule,” we do not reach her argument that her conduct was not “willful” within the meaning of 25 N.C. Admin. Code 1I.2304(b)(4).

B. Just Cause (De Novo Review)

Subchapter 1I of Title 25 of the North Carolina Administrative Code permits dismissal of a State employee “for a *current* incident of unacceptable personal conduct.” 25 N.C. Admin. Code 1I.2304(a) (emphasis added). Ms. Watlington contends that of the six acts concluded to be unacceptable personal conduct, only her acceptance of jewelry was current; as a result, Ms. Watlington reasons, any just cause analysis must focus solely on that act alone. Reviewing the record and applicable law, we disagree.³

3. The parties treat the “current-ness” issue as part of *Warren*’s second prong: “whether the employee’s conduct falls within one of the categories of unacceptable personal

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25 N.C. Admin. Code 11.2304(a) does not define the word “current.” Neither party cites, and we are unable to find, any case law interpreting the term with respect to this specific subchapter of the Administrative Code. A paucity of decisions addresses this term as used in other subsections of the Administrative Code. *See Renfrow v. N.C. Dep’t of Revenue*, 245 N.C. App. 443, 448, 782 S.E.2d 379, 382-83 (2016) (interpreting the word “current” as used in 25 N.C. Admin. Code 1J.0608, the subchapter applicable to discipline of state—rather than local government—employees). In *Renfrow*, the Department of Revenue discovered in 2012 that one of its employees had failed to pay \$7,107.00 in taxes years earlier, between 2008 and 2010. *Id.* at 445, 782 S.E.2d at 380. In March 2012, the employee met with her supervisor and entered into a payment plan to cover her back taxes. *Id.* at 445, 782 S.E.2d at 380. Nineteen months after the March 2012 meeting, the Department of Revenue effectively dismissed the employee for her failure to comply with tax laws between 2008 and 2010. *Id.* at 445, 782 S.E.2d at 381. We reversed her dismissal after concluding that her acts of unacceptable personal conduct were not “current” per N.C. Admin. Code 1J.0608 “in the absence of *any* explanation for [the Department of Revenue’s] nineteen-month delay.” *Id.* at 448, 782 S.E.2d at 382 (emphasis in original). We declined to impose a definite limit on the word “current,” however, instead agreeing with the Department of Revenue that “ ‘[r]ather than a length of time certain, allowing a reasonable time under the circumstances would seem more appropriate.’ ” *Id.* at 448, 782 S.E.2d at 382 (alteration in original). We further noted that “[i]n cases like this one, where employee misconduct is not readily discoverable, whether the misconduct is a ‘current incident’ depends on the amount of time that elapsed between the employer’s discovery of the misconduct and the contested disciplinary action.” *Id.* at 448, 782 S.E.2d at 382 n.1.

In this case, the ALJ made three findings of fact that, although RCDSS staff were aware of some of the acts concluded to be “unacceptable personal conduct” before the investigation into Ms. Watlington in December 2015, none was known to any staff member with disciplinary

conduct provided by the Administrative Code.” 221 N.C. App. at 383, 726 S.E.2d at 925. We hold that this question more properly falls within the third prong: “whether that misconduct amounted to just cause for the disciplinary action taken.” *Id.* at 383, 726 S.E.2d at 925. Our reasoning is simple. Ms. Watlington’s conduct, regardless of any temporal considerations, fell within at least one category of “unacceptable personal conduct” in 25 N.C. Admin. Code 11.2304(b), satisfying the second prong of *Warren*. Whether or not those acts of unacceptable personal conduct justify dismissal, however, is limited by the requirement that they be “current.” Thus, the issue of “current-ness” involves only whether the particular act of unacceptable personal conduct may warrant dismissal, *i.e.*, whether the agency terminating employment had just cause to do so.

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authority. Ms. Watlington challenges these findings as unsupported by the evidence. But she does not challenge the ALJ's Conclusion of Law 8, which states: "Although some of the above [unacceptable personal] conduct does not appear to be 'current', it was first exposed to management by the December 2015 investigation."⁴ Though labeled a conclusion of law, this determination consists solely of a factual finding that management was not apprised of Ms. Watlington's misconduct until December 2015. We treat conclusions of law that are in actuality factual determinations as findings of fact. *Warren*, 221 N.C. App. at 379, 726 S.E.2d at 923; *see also In re Simpson*, 211 N.C. App. 483, 487-88, 711 S.E.2d 165, 169 (2011) ("When this Court determines that findings of fact and conclusions of law have been mislabeled by the trial court, we may reclassify them, where necessary, before applying our standard of review." (citations omitted)).

Applied to the factual question of when RCDSS staff with disciplinary authority became aware of the alleged acts of unacceptable personal conduct, the "whole record test" requires "examination of whether the [ALJ's] unchallenged findings in the [ALJ's order] support the conclusion that 'just cause' existed to discharge [Ms. Watlington] from employment on grounds of unacceptable personal conduct[.]" *Gray v. Orange Cty. Health Dep't*, 119 N.C. App. 62, 75, 457 S.E.2d 892, 901 (1995). Because Conclusion of Law 8 is an unchallenged factual finding, it is binding on this Court. *Blackburn*, 246 N.C. App. at 210, 784 S.E.2d at 519; *see also Watlington I*, ___ N.C. App. at ___, 799 S.E.2d at 404 (holding Finding of Fact 13 in the first final decision entered by the ALJ as binding because it went unchallenged by either party on appeal).

Even if we were to assume *arguendo* that Conclusion of Law 8 is not binding, the evidence supports findings that at least two of the relevant acts of misconduct were unknown to management staff of RCDSS until December 2015: (1) the acceptance of jewelry during a case visit between a parent and a child under Ms. Watlington's supervision; and (2) the receipt of a \$60 loan from a foster parent of a child under her supervision. It is not necessary that every act committed by Ms. Watlington be "current" so long as at least one instance of unacceptable personal conduct is, as "[o]ne act of [unacceptable personal conduct] presents 'just cause' for any discipline, up to and including dismissal." *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005) (citations omitted).

4. On appeal, Ms. Watlington could have challenged Conclusion of Law 8 as either: (1) a conclusion unsupported by any factual findings; or (2) a mislabeled finding of fact unsupported by the evidence. She did neither, however.

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It is undisputed that Ms. Watlington accepted the jewelry in December 2015. It is also undisputed that Ms. Watlington accepted the loan between two and three years earlier after she commented to a foster parent that she could not pay her power bill. But the testimony by RCDSS's then-director indicates that the loan—which Ms. Watlington admitted she had not paid back at the time of her dismissal—was not disclosed to management until December 2015 during the internal investigation; while Ms. Watlington's immediate supervisor addressed other issues in an 18-month period prior to December 2015, those issues arose outside the timeframe of the loan. The director testified that the unspecified issues addressed by Ms. Watlington's intermediate supervisor during the prior 18 months were not contained within the acts of unacceptable personal conduct listed in the pre-dismissal conference letter. The director further testified that the supervisor had previously addressed “performance issues, and the matter at hand [in the pre-dismissal conference] was a personal conduct issue.” Finally, the director, when asked if she had participated in any prior discipline of Ms. Watlington, testified that she had only “overhear[ed] a conversation between [the intermediate supervisor] and Ms. Watlington when she was agitated[.]”⁵ This testimony is “relevant evidence a reasonable mind might accept as adequate to support [the ALJ's] conclusion[.]” *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895 (citation and internal quotation marks omitted), and therefore sufficient to sustain his factual finding that persons with disciplinary authority were unaware of these prior acts of unacceptable personal conduct until December 2015.

We are therefore left with the question of whether RCDSS's disciplinary actions concerning Ms. Watlington's prior acts of misconduct were taken within a “reasonable time under the circumstances.” *Renfrow*, 245 N.C. App. at 448, 782 S.E.2d at 382 (internal quotation marks omitted); see also *Hershner v. N.C. Dep't of Admin.*, 232 N.C. App. 552, 555, 754 S.E.2d 847, 849-50 (2014) (holding that unchallenged findings supported an ALJ's conclusions of law even where the challenged findings were assumed to be unsupported by the evidence). We hold that they were. The evidence and factual finding in Conclusion of Law 8 establish that RCDSS management first became aware of Ms. Watlington's prior misconduct during the investigation in December 2015. Two days

5. Ms. Watlington's counsel objected to “discussion of that conversation as hearsay[.]” and subsequent objections and a motion to strike further questioning and testimony concerning the conversation were sustained. That the director's only prior knowledge of a disciplinary matter regarding Ms. Watlington was witnessing a conversation, however, is not hearsay.

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after placing her on leave and starting its investigation, RCDSS held a pre-dismissal conference with Ms. Watlington, wherein she admitted to the acts of unacceptable personal conduct. Three days after the conference, Ms. Watlington was dismissed. This five-day period—from management's discovery of these acts of unacceptable personal conduct to Ms. Watlington's dismissal—constitutes a "reasonable time under the circumstances," *id.* at 448, 782 S.E.2d at 382, and her acts were therefore "current" within the meaning of 25 N.C. Admin. Code 11.2304(a).

Ms. Watlington contends that the language of the administrative code expressly prohibits RCDSS from terminating her based on any prior acts of misconduct, regardless of when they became known to management, citing *Renfrow*. We disagree, in part because *Renfrow* is inapposite, as it interpreted the "current" nature of acts of unacceptable personal conduct by examining the time between management's knowledge and the employee's eventual dismissal, as opposed to the time between the conduct and the employee's dismissal. 245 N.C. App. at 448, 782 S.E.2d at 382. Also, Ms. Watlington's interpretation of the word "current" would lead to illogical outcomes, and this Court will not adopt statutory construction that "will lead to absurd results[] or contravene the manifest purpose of the Legislature[.]" *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (citations and internal quotation marks omitted). For example, if the word "current" depends upon when personal misconduct occurred, the statute would immunize the clever employee who embezzles money on a single occasion and successfully hides that fact from management for a lengthy period of time. We therefore reject this interpretation and Ms. Watlington's argument on this point.

Ms. Watlington next contends that RCDSS was without just cause to dismiss her, comparing the misconduct in this case to the misconduct in a plethora of cases in which our appellate courts have held just cause for dismissal existed. This formulaic approach is unpersuasive, as just cause "is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case." *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900 (internal quotation marks and citations omitted).

Turning to the specific "facts and circumstances of [this] individual case[.]" *id.* at 669, 599 S.E.2d at 900, this Court has already affirmed the ALJ's finding that Ms. Watlington: (1) accepted a \$60 loan from an RCDSS client; (2) used \$6 of a minor child's money to purchase food for herself and paid the money back a week later; (3) accepted food from foster parents on multiple occasions; (4) gave a foster family a bassinet

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without authorization, though she later retrieved it once told it was a problem; and (5) accepted a gift of earrings from a foster parent and minor child, which was later returned once she was notified it was an issue. Broadly speaking, these acts display a repeated inclination by Ms. Watlington to accept gifts from or make gifts to RCDSS clients in contravention of RCDSS policy; while she did return some items, she appears to have done so only after being confronted by her supervisor. The ALJ correctly considered this conduct in the context of Ms. Watlington's duties, pointing out that her direct involvement with minor children "creat[ed] a heightened risk of legal and financial exposure for [RCDSS] upon her engagement in unacceptable personal conduct during the performance of her duties." He also correctly noted that Ms. Watlington's "actions can easily be misconceived by citizens to be the actions of the department as a whole[.]" and that "[i]n some instances, it is the appearance of an impropriety, as much as the impropriety itself, that has the potential of degrading [RCDSS's] reputation."⁶

We agree with these observations by the ALJ. They apply to each of Ms. Watlington's acts of unacceptable personal conduct, whether considered collectively or individually, and, on *de novo* review, we hold that the ALJ properly concluded RCDSS possessed just cause to dismiss Ms. Watlington for her multiple acts of current unacceptable personal conduct.

Although we hold RCDSS had just cause to dismiss Ms. Watlington, her argument that her conduct is not as severe as that in other cases where just cause existed is not as specious one. The record does not disclose that she committed a crime, caused anyone physical or emotional harm, or acted with evil or calamitous intent. But Ms. Watlington played a critical role in supervising and reporting on visitations with children in RCDSS custody, and her reports were relayed by social workers to trial courts tasked with determining the children's fates. The State's intercession into the relationship between a parent and a child, through the acts of its employees, implicates the "freedom of personal choice in matters

6. Ms. Watlington argues that these conclusions are contrary to the ALJ's finding in the order affirmed in part, reversed in part, and remanded in *Watlington I* that found no actual harm to RCDSS as a result of her actions. The absence of actual harm, however, does not preclude the ALJ from finding the existence of the potential for harm from the evidence, and she does not argue that repeated acts with the potential to cause harm cannot give rise to just cause for dismissal. Further, we note that there is evidence in the record to support the concerns identified by the ALJ: the employee orientation materials admitted into evidence acknowledge that ethical conduct is imperative "[b]ecause our reputation is important and the public is watching. We need to continue to improve our image."

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of family life[.]" *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 606 (1982), a "fundamental liberty interest [that] includes natural parents' ability to provide and maintain the care, custody and management of their child." *In re Murphy*, 105 N.C. App. 651, 653, 414 S.E.2d 396, 397 (1992). And "[t]he State of North Carolina . . . must remain a responsible steward of the public trust[.]" *Peace v. Employment Sec. Comm'n of North Carolina*, 349 N.C. 315, 327, 507 S.E.2d 272, 281 (1998), particularly when "provid[ing] . . . services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence." N.C. Gen. Stat. § 7B-100(3) (2017). Considered in this context,⁷ Ms. Watlington's unacceptable personal conduct, albeit not necessarily malicious or corrupt, could erode the public's faith in RCDSS and provide the requisite cause to justify dismissal.

CONCLUSION

For the foregoing reasons, we affirm the ALJ's order concluding RCDSS possessed just cause to terminate Ms. Watlington.

AFFIRMED.

Judges **ELMORE** and **MURPHY** concur.

7. Though we note the general significance of child welfare agencies and affirm the ALJ's conclusion that Ms. Watlington's specific acts violated her agency's personnel policies and justified her dismissal, we acknowledge that other counties may choose to protect the public trust by drafting rules different from RCDSS, and nothing in this opinion should be read to hinder or limit such a determination. Again, just cause "is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case." *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900 (internal quotation marks and citations omitted).

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DRAKEFORD v. BAEZ No. 18-181	Mecklenburg (13CVD11939)	Affirmed
GAINES v. GAINES No. 17-1114	Iredell (11CVD2012)	Affirmed as modified
GUIDOTTI v. MOORE No. 18-221	Bladen (15CVS108)	Affirmed
IN RE C.S. No. 18-450	New Hanover (17JA316)	Reversed
IN RE E.G.B. No. 18-329	Haywood (16JA6) (16JA7)	Affirmed
IN RE L.L. No. 18-168	McDowell (17JA73)	Vacated and Remanded
IN RE N.J.Y. No. 18-362	Guilford (15JT314-316)	Affirmed
IN RE R.S.B. No. 18-231	New Hanover (16JT29)	Dismissed
PAWN & GIFTS, INC. v. BRADLEY No. 18-201	Sampson (16CVD1422)	Affirmed
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STATE v. PARKER No. 17-1226	Wake (14CRS202985) (14CRS2274)	No Error
STATE v. POLE No. 17-1393	New Hanover (13CRS60326)	No Error
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Malicious misuse of process after issuance—sufficiency of allegations—Plaintiff alleged sufficient allegations for abuse of process by alleging that after he was charged and arrested for obtaining property by false pretenses and insurance fraud for pursuing and taking worker's compensation benefits, defendants caused criminal proceedings to be continued against him for the purpose of recouping funds. **Seguro-Suarez v. Key Risk Ins. Co.**, 200.

ADMINISTRATIVE LAW

Administrative Procedure Act—adoption of retirement benefits cap factor—applicability—legislative intent—The Board of Trustees of the Teachers' and State Employees' Retirement System was required to adhere to the rule-making provisions of the Administrative Procedures Act (APA) before adopting a cap factor to limit retirement benefits for certain members, pursuant to N.C.G.S. § 135-5(a3), based on the intent of the legislature as evidenced by the plain language of the relevant statutes. Statutory interpretation reveals neither an express nor an implied exemption from the APA in Chapter 135, and the cap factor falls within the APA definition of a "rule." The requirement that the cap factor must be based upon professionally determined assumptions and projections does not implicate an alternative procedure to that found in the APA. **Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer**, 325.

State agency—rule interpretation—deference—In an action to determine whether the adoption of a cap factor limiting the retirement benefits of certain members of the Teachers' and State Employees' Retirement System needed to comply with the rule-making procedures of the Administrative Procedures Act (APA), the Court of Appeals did not need to determine whether the trial court gave proper deference to the agency's interpretation of the authorizing statute because it is the Court's duty to interpret administrative statutes. **Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer**, 325.

APPEAL AND ERROR

Abandonment of argument—challenged findings of fact—failure to specify argument—Where a plaintiff appealing an order of the Industrial Commission challenged certain findings of fact but failed to specifically argue how those findings were unsupported by record evidence, the issue was deemed abandoned pursuant to Rule of Appellate Procedure 28(b)(6). **Khatib v. N.C. Dep't of Transp.**, 168.

Abandonment of issues—citation of legal authority—Where plaintiffs argued that the trial court's dismissal of their malpractice complaint pursuant to Rule 9(j) violated their due process rights but they failed to cite any legal authority to support their argument, the Court of Appeals deemed the issue abandoned. **Fairfield v. WakeMed**, 569.

Driving while impaired—statutory violations—per se prejudice analysis—In a driving while impaired (DWI) case, defendant failed to show she was per se prejudiced by the magistrate's statutory violations in the absence of any evidence the State deprived defendant of access to potential witnesses or an attorney, or any argument by defendant that evidence was gathered in violation of her constitutional or statutory rights and should have been suppressed. The Court of Appeals found no grounds to grant a writ of certiorari to review the denial of defendant's motion to dismiss where defendant voluntarily pleaded guilty to DWI prior to analysis of her

APPEAL AND ERROR—Continued

blood sample, she stipulated to a factual basis for the DWI, and she received the benefit of her plea bargain by having two drug charges dismissed. **State v. Ledbetter, 71.**

Findings of fact—challenged—inconsequential to outcome—In a child custody case, a mother's challenges to certain findings of fact were overruled where an expert's testimony (which she had challenged as inadmissible in a previous argument) supported several of the findings, and the other challenged findings had no bearing on the outcome of the case. **Sneed v. Sneed, 448.**

Interlocutory—substantial right affected—duty to defend—An appeal from a summary judgment in an automobile accident case affected a substantial right and was properly before the Court of Appeals where it implicated an insurance company's duty to defend. **Smith v. USAA Cas. Ins. Co., 40.**

Mootness—custody dispute—child reaching age of majority—An appeal in a custody action was dismissed as moot as to one child, because that child reached the age of eighteen during the pendency of the appeal and therefore was no longer a minor subject to custody disputes. **Chavez v. Wadlington, 541.**

Motions to suppress—no affidavits—waiver of appellate review—In a first-degree murder trial, defendant's failure to include supporting affidavits with several motions to suppress various documentary evidence as required by N.C.G.S. § 15A-977(a) constituted a waiver of his right to appellate review of any challenges to the admission of that evidence. Further, where some of the motions were not actually ruled upon by the trial court and defendant did not object to admission of the underlying evidence, defendant failed to preserve review of those motions for appeal. **State v. Dixon, 676.**

No meaningful argument—unfair trade practices—purchase of business—internet sweepstakes—Plaintiff's claim for unfair and deceptive trade practices in an action arising from her purchase of an internet sweepstakes business was deemed abandoned when she failed to submit any meaningful argument as to how the trial court erred by granting summary judgment for defendants. **Thompson v. Bass, 285.**

No meaningful argument—civil conspiracy—purchase of business—internet sweepstakes—Plaintiff's claim for civil conspiracy in an action arising from her purchase of an internet sweepstakes business was deemed abandoned when she failed to submit any meaningful argument as to how the trial court erred by granting summary judgment for defendants. **Thompson v. Bass, 285.**

Preservation of issues—Confrontation Clause—telephone conversation—Defendant waived a Confrontation Clause objection involving the authentication of a jailhouse telephone conversation where the objection was not renewed during cross-examination when defendant attempted to ask about a statement that had been ruled inadmissible. **State v. Vann, 724.**

Preservation of issues—double jeopardy—not raised below—Defendant failed to preserve the issue of double jeopardy in being charged with false pretenses and unlawfully accessing a government computer where he based his argument on a civil action resulting in the revocation of his bail bonds license and did not bring forth an argument about a lesser included offense. The trial court did not make a determination on this issue. **State v. Mathis, 263.**

Preservation of issues—due process—prosecutorial misconduct—In a prosecution for murder and robbery, defendant failed to preserve for appellate review

APPEAL AND ERROR—Continued

arguments that the prosecutor failed to correct incorrect testimony, elicited incorrect testimony, and recited the law incorrectly in closing argument, because he did not raise these issues at trial. **State v. McQueen, 703.**

Preservation of issues—fatal variance between indictment and evidence—not raised at trial—Defendant failed to preserve for appellate review an argument that a fatal variance existed between his indictment for trafficking opium by possession and the evidence at trial because he did not raise this issue as a basis for his motion to dismiss in the trial court. **State v. Bice, 664.**

Preservation of issues—full faith and credit—out-of-state child custody order—In an action to modify a child custody order entered in Florida, plaintiff (the child's mother) failed to preserve for appellate review the issues that North Carolina applied the wrong law and did not give full faith and credit to the Florida order where she sought to modify custody pursuant to North Carolina law, not Florida law. The trial court erred in considering plaintiff's arguments on these issues in her purported Rule 59 motion for a new trial because she failed to preserve them by raising these objections at trial. **Quevedo-Woolf v. Overholser, 387.**

Preservation of issues—juror presence at charge conference—sufficiency of record—Defendant failed to provide sufficient information for appellate review of his argument that a juror who entered the courtroom during the jury charge conference in defendant's trial for possession of a firearm by a felon heard information that deprived defendant of a unanimous jury verdict. The scant facts in the transcript, without a supplemental narrative to provide context, were not enough to overcome the presumption that the court proceedings were correct and regular where they merely showed that the courtroom clerk noticed a juror entering the courtroom, the judge took notice of the juror, and then instructed counsel to proceed with the charge conference. **State v. Wardrett, 735.**

Preservation of issues—motion in limine—argument not raised at trial—Defendant did not preserve for appeal the question of whether the trial court erred by failing to require the State to file a written pretrial motion to suppress where he did not raise the issue at trial. **State v. Vann, 724.**

Preservation of issues—Rule 59 motion—sufficiency of allegations—The Court of Appeals elected to treat plaintiff mother's appeal in a child custody action as a writ of certiorari where she failed to timely appeal from the trial court's custody order and her purported Rule 59 motion did not contain sufficient allegations to toll the thirty-day period for appeal. **Quevedo-Woolf v. Overholser, 387.**

Preservation of issues—waiver—argument raised for first time on appeal—Defendant's argument concerning a police K-9's reliability was waived where he raised it for the first time on appeal. **State v. Degraphenreed, 235.**

Preservation of issues—waiver—objection to limiting instruction on evidence—failure to object to evidence itself—Defendant waived an argument that the trial court erred in his first-degree murder trial by admitting evidence of defendant's prior assaults against the murder victim to show identity, where defendant objected only to the court's limiting instruction to the jury and not to the evidence, its limited admissibility, or its use in proving identity. **State v. Enoch, 474.**

Record on appeal—omission of summary judgment order—preclusion of appellate review—Plaintiffs' argument regarding the trial court's denial of their

APPEAL AND ERROR—Continued

motion for summary judgment was dismissed where plaintiffs failed to include a copy of the order denying summary judgment in the record on appeal, precluding appellate review. **Burton Constr. Cleanup & Landscaping, Inc. v. Outlawed Diesel Performance, LLC, 317.**

Record on appeal—omission of trial transcript—preclusion of appellate review—Plaintiffs' failure to include the trial transcript in the record on appeal precluded appellate review of their argument concerning entry of directed verdict. **Burton Constr. Cleanup & Landscaping, Inc. v. Outlawed Diesel Performance, LLC, 317.**

ATTORNEY FEES

Alimony and child support action—modification—An award of attorney fees in a child support and alimony action was vacated where the matter extended over several years, the circumstances existing on the dates of the motions for modification differed greatly, and the trial court did not specify the basis for the award. **Hill v. Hill, 600.**

Nonjusticiable claims—frivolous and malicious claims—false affidavit—The trial court did not abuse its discretion by awarding attorney fees and costs to defendants where plaintiff swore in an affidavit that his truck was undriveable when it left defendants' shop but admitted at trial that the allegation was not true. The false affidavit was the only reason the case proceeded to trial, and plaintiffs' claims were frivolous and malicious. **Burton Constr. Cleanup & Landscaping, Inc. v. Outlawed Diesel Performance, LLC, 317.**

BAIL AND PRETRIAL RELEASE

Bond forfeiture—relief from final judgment—statutory requirements—statement of reasons and supporting evidence—The trial court erred in granting a surety relief from a bond forfeiture after a criminal defendant removed his ankle monitoring device and absconded during trial where the surety's motion was deficient under N.C.G.S. § 15A-544.8 because it failed to set forth evidence of extraordinary circumstances that would justify relief. **State v. Crooms, 230.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Misdemeanor child abuse—heroin use in presence of children—sufficiency of evidence—Although the State failed to prove a rock-like substance seized from defendant's hotel room was heroin so as to support a possession of heroin conviction, the trial court properly denied defendant's motion to dismiss a related charge of misdemeanor child abuse on the basis that she used heroin in the presence of her children. That charge did not require the State to prove the seized substance was heroin; evidence that defendant was found unconscious from an apparent drug overdose, her admission that she used heroin, and the presence of drug paraphernalia consistent with heroin use in the hotel room occupied by defendant and her children was sufficient to submit the charge to the jury. **State v. Osborne, 710.**

CHILD CUSTODY AND SUPPORT

Child support—frustration of appellate review—need for evidentiary hearing—failure to address all claims—The Court of Appeals vacated a child support

CHILD CUSTODY AND SUPPORT—Continued

order and remanded the matter for a new evidentiary hearing where the trial court failed to conduct sufficient evidentiary proceedings to support its findings and conclusions, made mathematical errors in its order, failed to address all of the mother's claims, and failed to make necessary findings for the mother's attorney fees claim. **Crews v. Paysour, 557.**

Custody modification—conduct inconsistent with protected status as parent—sufficiency of findings and conclusions—In an action to modify a child custody order entered in Florida, the trial court's determination that plaintiff mother acted inconsistently with her constitutionally protected status as parent to her daughter was supported by clear and convincing evidence that the mother did not maintain meaningful contact with the child for several years and did not make any formal attempt to regain custody from the child's grandmother (defendant), aside from one abandoned court filing, for over six years. **Quevedo-Woolf v. Overholser, 387.**

Jurisdiction—prior orders on appeal—subsequent order void—In an action to modify a child custody order entered in Florida, the trial court's entry of an order modifying custody was invalid for lack of jurisdiction because prior custody orders were on appeal; as a result, the child was improperly removed from defendant grandmother's custody. **Quevedo-Woolf v. Overholser, 387.**

Jurisdiction—subsequent order—different judge—In an action to modify a child custody order entered in Florida, a second North Carolina trial judge had no jurisdiction to enter an order on multiple bases: first, as previously decided, plaintiff mother's purported Rule 59 motion for a new trial was not a valid Rule 59 motion; and second, the subsequent judge had no subject matter jurisdiction to consider plaintiff's motion for a new trial where the initial trial court judge properly entered the order from which plaintiff sought relief, because a trial judge who did not try a case may not rule upon a motion for a new trial. Since the second judge had no subject matter jurisdiction, it was also improper for the judge to issue rulings regarding the choice of law in the case. **Quevedo-Woolf v. Overholser, 387.**

Jurisdiction—Uniform Child Custody and Jurisdiction Enforcement Act—modification of out-of-state order—The trial court had jurisdiction to modify a prior child custody order entered in Florida pursuant to the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA), based on undisputed findings that North Carolina was the child's "home state" and that none of the relevant persons were residents of Florida during the period of time at issue. Florida ceased to have exclusive, continuing jurisdiction once the jurisdictional requirements for modification were met in North Carolina. Further, any violation of a Florida statute that may have occurred as a result of the grandmother (defendant) moving the child to North Carolina did not affect North Carolina's jurisdiction under the UCCJEA. **Quevedo-Woolf v. Overholser, 387.**

Modification of custody—loss of job—imputed income—motion pending for four years—A child support order was remanded where the dispute began when the father lost his job, he continued to pay the required support until he eventually unilaterally reduced the payments, he engaged in a lengthy job search, he eventually accepted a job at a reduced salary, and he got married and bought a new car and house. The original motion was pending for four years and the Court of Appeals could not determine whether the trial court imputed income to the father and the basis of the imputation for each time period. The matter was remanded for correction of the erroneous date of the father's settlement with his prior employer along with related appropriate corrections, and for the basis for any imputations of income. **Hill v. Hill, 600.**

CHILD CUSTODY AND SUPPORT—Continued

Modification of prior order—substantial change of circumstances—best interests of children—The trial court did not abuse its discretion by determining that it was in the best interests of the children to change custody so that they primarily resided with their mother. Previously, primary custody had been with the father, with the children residing with the paternal grandparents, but the trial court found that primary residence with their mother was in their best interests due the mother's maintenance of sobriety, her ability to maintain a stable job and provide a proper home, the children's close relationship to their stepfather, the father's increasingly autocratic control seeking to shut the mother out of the children's lives, and the father's need to rely on his parents to care for the children. **Shell v. Shell, 30.**

Modification of prior order—substantial change of circumstances—communication between parents—Changes in communication between the parents constituted a substantial change in circumstances in an action to change a prior custody order. Although the father argued that no substantial change in communications had occurred because the parties had had difficulty with communication before the prior order, the trial court noted that the father had become less cooperative and less willing to communicate. **Shell v. Shell, 30.**

Modification of prior order—substantial change of circumstances—father's capabilities—In a proceeding to modify a prior child custody order, there was a change in circumstances concerning the father's inability to read and to help the children with their schoolwork. Although the father argued that there had been no change since the prior order, the father's limited capabilities had more impact on the children as they advanced in school. **Shell v. Shell, 30.**

Modification of prior order—substantial change of circumstances—mother's remarriage—A mother's remarriage constituted a change in circumstances in an action to modify a child custody order where the father contended that the relationship between the children and their stepfather had not changed. The trial court's finding of the stepfather's development of a strong relationship with the children and his positive involvement in the children's lives was a change of circumstances affecting the children's welfare. **Shell v. Shell, 30.**

Modification of prior order—substantial change of circumstances—sobriety—A mother's maintenance of sobriety for over four years and the resulting changes in her life were a substantial change in circumstances for purposes of modifying a prior custody order. Her ability to care for the children had improved dramatically. **Shell v. Shell, 30.**

Standing—"other person"—third-party non-parent—significant relationship over extensive period of time—act inconsistent with parent's constitutionally protected status—A third-party non-parent (plaintiff), who had been the live-in romantic partner of defendant-mother, lacked standing to seek custody of defendant-parents' biological children conceived and born during defendants' marriage. (Defendants had separated but never divorced.) Plaintiff's relationship with the children ended more than a year before she filed the custody complaint, when she evicted the children and their mother from her home. Furthermore, plaintiff never alleged that either defendant was unfit or engaged in conduct inconsistent with his or her constitutionally protected status as a parent. **Chavez v. Wadlington, 541.**

Support—modification—loss of job—depletion of estate—The trial court was not authorized to base a child support modification solely upon depletion of the husband's estate in a case in which a child support order was entered, the husband lost

CHILD CUSTODY AND SUPPORT—Continued

his job and engaged in a long job search during which he paid the child support obligation from his assets until his assets ran low, the husband eventually accepted a job at a lower salary, and four years elapsed from the motion to the hearing. Although depletion of the husband's estate may be a proper basis to establish an alimony obligation, the same is not necessarily true for child support. The case was remanded for findings to clarify whether the trial court was actually imputing income and the basis for imputing income. **Hill v. Hill, 600.**

CHILD VISITATION

Ceased visitation for father—neglected sons—sexual abuse of daughters—The trial court did not abuse its discretion by ceasing visitation between defendant father and his sons where defendant had sexually abused his daughters, his sons were adjudicated neglected, and the trial court concluded that visitation with any of the children would be against their best interests, health, and safety. **In re W.H., 24.**

Civil contempt—custody order interpretation—implied forced visitation—In a contentious custody and visitation case in which a mother sought to hold a father in civil contempt because their teenage daughter was not returned to her physical custody, the Court of Appeals rejected the mother's argument that the trial court should have found the father in contempt for failing to force the daughter to adhere to the custody order's visitation schedule. Precedent did not establish a "forced visitation" rule, implied or otherwise. The trial court properly considered the best interests of the teenage daughter, who suffered from depression and self-harm and who expressed her preference not to visit with her mother, and the circumstances at the time of the hearing, before determining that the father was not in willful contempt. **Grissom v. Cohen, 576.**

Civil contempt—visitation provisions—willfulness—In a contentious custody and visitation case in which a mother sought to hold a father in civil contempt because their teenage daughter was not returned to her physical custody, the trial court did not misapprehend the law regarding custody and visitation when it found the father was not in willful contempt for failure to force his daughter to visit or return to her mother. The only way a trial court can enter a "forced visitation" order is under compelling circumstances, after giving the parties notice and an opportunity to be heard, and entering an order with findings and conclusions that take into account the best interests of the child; it would be a rare case in which physically forcing a child to visit or stay with a parent would be in that child's best interests. **Grissom v. Cohen, 576.**

Orders entered pending appeal—prior order controls—In an action to modify a child custody order entered in Florida, where several orders were deemed void and vacated by the Court of Appeals, the last prior order regarding visitation of the child with plaintiff mother controlled. **Quevedo-Woolf v. Overholser, 387.**

Temporary suspension of parent's visitation—purposeful alienation of children by one parent—children's best interests—The trial court did not abuse its discretion by ordering a conditional, temporary suspension of a mother's visitation rights to her children where the mother had purposefully alienated the children from their father and thereby had caused a detriment to the children's welfare. **Sneed v. Sneed, 448.**

CHURCHES AND RELIGION

Ecclesiastical matters—entanglement—church membership—Plaintiffs' removal from a church's membership was a core ecclesiastical matter, in which the trial court properly concluded it was barred from entangling the courts. **Lippard v. Diamond Hill Baptist Church**, 660.

CIVIL PROCEDURE

Rule 59—motion to amend—interlocutory order—validity of request—In an action challenging changes to a revocable trust based on allegations of undue influence, the Court of Appeals declined to exercise its discretion and treat plaintiffs' untimely appeal (from orders allowing a party to intervene, denying plaintiffs' motion to stay the proceedings, and granting defendants' motions to dismiss) as a writ of certiorari after determining that plaintiffs' motion to amend the trial court's orders did not adequately request valid Rule 59(e) relief. Plaintiffs' request for relief was not within the trial court's jurisdiction to grant where they asked for reconsideration of the interlocutory portion of the decision and not of the final judgment dismissing their claims, and reargued issues already addressed. **Davis v. Rizzo**, 9.

Rule 59—Rule 60—request for relief—motion to amend order—abuse of discretion analysis—In an action challenging changes to a revocable trust based on allegations of undue influence, the trial court did not abuse its discretion in denying plaintiffs' postjudgment motion to amend pursuant to Rules 59 and 60 without holding a hearing where plaintiffs failed to request the proper relief under each rule. The Court of Appeals considered whether the trial court violated Rule 17 by dismissing plaintiffs' claims without first inquiring into the competency of the settlor of the trust, and concluded it did not. Plaintiffs' only showing of incompetence was based on unsubstantiated allegations and arguments, while the settlor introduced affidavits from herself and her treating physician asserting her competence. **Davis v. Rizzo**, 9.

CONSPIRACY

Civil—insurance company—intra-corporate immunity rule—Plaintiff's assertion that the insurance company paying his worker's compensation benefits conspired with several of its employees to maliciously prosecute him for allegedly taking benefits under false pretenses did not give rise to a valid claim for civil conspiracy, since a corporation cannot conspire with itself. **Seguro-Suarez v. Key Risk Ins. Co.**, 200.

CONSTITUTIONAL LAW

Effective assistance of counsel—not ripe for review—Defendant's claim of ineffective assistance of counsel in his trial for multiple drug offenses was dismissed without prejudice to his right to raise his claims in a motion for appropriate relief. **State v. Bice**, 664.

Effective assistance of counsel—principal State's witness—alleged failure to expose existence of immunity deal—In a prosecution for murder and robbery, defendant's trial counsel was not ineffective for failing to ensure the jury was informed that the principal witness against defendant could have been charged with first-degree murder based on felony murder but was not. Although defendant believed the witness's testimony was secured through an immunity agreement and that the witness received something of value in exchange for his testimony which

CONSTITUTIONAL LAW—Continued

affected his credibility, there was no evidence of such an agreement. Further, defense counsel attempted to elicit information about a deal and requested related jury instructions. **State v. McQueen, 703.**

First-degree murder—juvenile offender—life without parole—In a case of first impression, the Court of Appeals determined that the Eighth Amendment required a trial court to consider, as a threshold matter, whether a juvenile offender convicted of first-degree murder qualified as an irreparably corrupt individual before imposing a sentence of life imprisonment without the possibility of parole. Where a trial court found that a juvenile offender's likelihood of rehabilitation was unknown or speculative, the imposition of life without parole was constitutionally invalid as applied to that individual. **State v. Williams, 516.**

North Carolina—funding of public education—civil penalties—punitive or in lieu of enforcement—The trial court erred by concluding that, as a matter of law, payments specified in an agreement between the attorney general and a meat-processing company (following the contamination of water supplies by swine waste lagoons) were not civil penalties required to fund public education pursuant to the state constitution. Genuine issues of material fact existed as to whether the payments under the agreement were intended to be punitive or in lieu of enforcement actions asserted against the company and its subsidiaries. **De Luca v. Stein, 118.**

CONSTRUCTION CLAIMS

Blasting—ultrahazardous activity—strict liability—independent contractor—A heavy equipment operator (plaintiff) who was injured by flying rock blasted in a construction site sufficiently alleged a strict liability claim against defendant development company—for whom plaintiff's employer was an independent contractor—to survive a 12(b)(6) motion to dismiss. The limited caselaw on the issue suggested that strict liability may attach to any party "responsible for" blasting, because it is an ultrahazardous activity. **Fagundes v. Ammons Dev. Grp., Inc., 138.**

CONTEMPT

Civil—failure to pay alimony and support—unilateral reduction—A trial court order holding a husband in contempt under N.C.G.S. § 5A-21(a) for failure to pay alimony and child support was remanded for a determination of arrearages and purge conditions where four years elapsed between the filing of a motion to modify and the hearing. In the interim, the husband lost his job, engaged in a long job search during which he paid the amounts owed from his assets, and eventually unilaterally reduced his payments. Although a supporting parent may file a motion to reduce his child support obligations, unilaterally reducing his payments entirely could subject him to contempt. Because of the time periods involved in this case, the reduction in alimony may not have been willful and it was possible that the husband was not in contempt for alimony if he was paying the new, reduced amount. **Hill v. Hill, 600.**

Civil—notice of noncompliance—argument waived—The husband in a child support and alimony matter waived any argument concerning notice of the acts for which he could be held in contempt when he actively participated in the trial without raising his objection. **Hill v. Hill, 600.**

Civil—show cause order—burden of proof—In a contentious custody and visitation case in which a mother sought to hold a father in civil contempt because their

CONTEMPT—Continued

teenage daughter was not returned to her physical custody, the trial court's order finding the father not to be in contempt did not contain a misapprehension that the mother carried the burden of proof. Although the order included a conclusion of law confusingly referring to the mother as not having met "her burden," the hearing transcript demonstrated the trial court's understanding of the differences between civil and criminal contempt and the differences in the burden of proof between a motion for contempt and a show cause order. **Grissom v. Cohen, 576.**

CONTRACTS

Breach—purchase of business—internet sweepstakes—summary judgment for defendants—The trial court did not err by granting summary judgment for defendants in an action arising from the purchase of an internet sweepstakes business. Plaintiff owned internet sweepstakes in two counties and sought to buy defendant's business in a third. Law enforcement officers shut down the business in the third county after the purchase. Plaintiff acknowledged receiving all of the items she had expected to receive with the purchase and operated the business from its purchase until it was shut down. Plaintiff did not allege the specific provisions breached, nor a single fact constituting a breach with either defendant. **Thompson v. Bass, 285.**

CORPORATIONS

Judicial dissolution—rights and interest of minority shareholder—In a complex business case arising from plaintiff's termination from her family's business, the trial court did not abuse its discretion by declining to order the dissolution of the business where plaintiff failed to forecast evidence that the company was deadlocked, unprofitable, or mismanaged pursuant to N.C.G.S. § 55-14-30. Even assuming plaintiff had a reasonable expectation to receive a salary and benefits regardless of whether she performed any work for the company, the evidence showed that plaintiff received substantial dividends from her company stock, that dissolution would harm the rights and interests of other shareholders, and that nothing precluded plaintiff from selling her interest in the company. **Brady v. Van Vlaanderen, 1.**

CRIMES, OTHER

Monthly bail bond reports—falsification—sufficiency of evidence—The trial court did not err by denying a bail bondsman's motion to dismiss a charge that he violated N.C.G.S. § 58-71-165 by submitting his required reports to the State with omissions. Although defendant contended that the omissions were clerical errors committed by staff, the State presented evidence of false reports, of defendant signing the attestation clause, and of the reports being filed. Whether the omissions were fraudulent or clerical errors were issues of fact to be determined by the jury. **State v. Mathis, 263.**

Unlawfully accessing government computer—direct or indirect—submission of bail bond reports—The trial court did not err by denying a bail bondsman's motion to dismiss charges for unauthorized access to a government computer under N.C.G.S. § 14-454.1 deriving from submission of reports to the State. While defendant had authorization to use the system, defendant exceeded that authorization by inputting fraudulent information. Moreover, even if defendant did not directly enter the questioned reports, his conduct comes within the plain language of the statute which includes the phrases "access or cause to be accessed" and "directly or indirectly." **State v. Mathis, 263.**

CRIMINAL LAW

Jury instruction—drug trafficking—ultimate user exemption—Evidence at defendant's trial for drug trafficking was insufficient to support a jury instruction on an "ultimate user" exemption in the Controlled Substances Act, because defendant's written confession, corroborated by his trial testimony, stated that he possessed his father's oxycodone pills in order to sell them to pay his bills and that he had researched how much money to charge for them. **State v. Bice, 664.**

Post-conviction DNA testing—materiality—sufficiency of showing—Defendant's request for post-conviction DNA testing did not entitle him to the appointment of counsel under N.C.G.S. § 15A-269(c) where he failed to carry his burden of proving DNA testing would be material to his claim of wrongful conviction by providing no more than conclusory statements that new technology would be more accurate and probative of the identity of the perpetrator. **State v. Tilghman, 716.**

Post-conviction inventory of evidence—adequacy of request—The trial court did not err in denying defendant's post-conviction motion for DNA testing prior to obtaining an inventory of biological evidence where defendant's accompanying motion to locate and preserve evidence did not include an actual request for an inventory as required by N.C.G.S. § 15A-268, and thus was not presented to the trial court for a ruling. While defendant's motion for DNA testing was itself sufficient to trigger an inventory of evidence pursuant to N.C.G.S. § 15A-269, there was no indication the custodial agency was served with that motion. Even if it was the trial court's burden to ensure service upon the agency, the court's denial of the motion for DNA testing was not in error where defendant failed to sufficiently allege materiality. **State v. Tilghman, 716.**

Prosecutor's closing argument—accountability to community—propriety—During closing argument at defendant's trial for possession of a firearm by a felon, the prosecutor's statements that the jurors should take into account the community's concerns and asking them to "handle this unfinished business" were not improper because they did not suggest the jury would be held accountable to the community's demands, but rather involved commonly held beliefs and were an attempt to motivate the jury to reach a just result. **State v. Wardrett, 735.**

Prosecutor's closing argument—matters outside the record—propriety—During closing argument at defendant's trial for possession of a firearm by a felon, the prosecutor did not improperly summarize a sequence of events involving defendant giving his gun to a friend to hide by saying defendant told his friend "man, get rid of this." Even though the phrase was not a direct quote, it represented a fair inference arising from the testimony. **State v. Wardrett, 735.**

Prosecutor's closing argument—name-calling—propriety—During closing argument at defendant's trial for possession of a firearm by a felon, the prosecutor's reference to defendant as one of a number of "fools" who participated in an altercation during which defendant fired a gun did not constitute an improper attack on defendant but was a fair commentary, based on the evidence, regarding reckless behavior. **State v. Wardrett, 735.**

Prosecutor's closing argument—personal belief of evidence—propriety—During closing argument at defendant's trial for possession of a firearm by a felon, the prosecutor improperly vouched for the truthfulness of the State's witnesses, but the statements were not grossly improper warranting a new trial, because the prosecutor made the statements to show the witnesses' relationships with defendant and how the witnesses tended to corroborate one another. **State v. Wardrett, 735.**

CRIMINAL LAW—Continued

Prosecutor's closing argument—personal belief of guilt—propriety—During closing argument at defendant's trial for possession of a firearm by a felon, the prosecutor improperly stated that defendant was "absolutely guilty," but the statements did not deprive defendant of a fair trial where they followed the prosecutor's evaluation of the strength of the State's witnesses and did not suggest any perceived personal knowledge of the prosecutor. **State v. Wardrett, 735.**

Selective prosecution—prima facie showing—false pretenses—bail bond license—A bail bondsman charged with obtaining his license by false pretenses through false reports did not make a prima facie showing of selective prosecution. The testimony defendant elicited did not, as he contended, show a lack of prosecution of bail bondsmen for filing false reports. **State v. Mathis, 263.**

DAMAGES AND REMEDIES

Punitive damages—tort claims—sufficiency of allegations—Plaintiff adequately alleged punitive damages pursuant to N.C.G.S. § 1D-15 where his tort claims for malicious prosecution, abuse of process, and unfair and deceptive trade practices (arising from defendants' initiation of a criminal prosecution against plaintiff for obtaining property by false pretenses and insurance fraud for taking worker's compensation benefits on false pretenses) survived defendants' motion to dismiss and he alleged malicious, fraudulent, willful, and wanton conduct. **Seguro-Suarez v. Key Risk Ins. Co., 200.**

Restitution—invalidly ordered restitution—remedy—Where portions of an order of restitution were invalid (because the losses arose from dismissed charges), the proper remedy was to vacate the restitution order and remand for resentencing on restitution. Defendant's stipulation to restitution as part of his plea agreement was not an agreement to pay restitution—but merely an admission that there was a factual basis for restitution—so the invalidly ordered restitution was not an essential or fundamental term of the agreement. **State v. Murphy, 78.**

Restitution—not arising from convictions—statutory authority—Where the State dismissed several breaking and entering charges against defendant in return for defendant's guilty pleas and stipulation to restitution, the trial court lacked statutory authority to order defendant to pay restitution to the alleged victims of the offenses in the dismissed indictments, because restitution may be ordered only to remedy losses arising out of offenses for which a defendant is convicted. **State v. Murphy, 78.**

DECLARATORY JUDGMENTS

Standing—automobile accident—third party victim—Third party automobile accident victims did not have standing to seek a declaratory judgment as to the coverage of insurance policies in which they were not named insureds. Although this was a conditionally delivered vehicle purchased the day of the accident, N.C.G.S. § 20-75.1 did not address the rights of third-party accident victims. **Smith v. USAA Cas. Ins. Co., 40.**

Standing—insurance company—automobile accident—An insurance company had standing to seek a declaratory judgment under N.C.G.S. § 1-257 as to coverage obligations arising from an automobile accident and an underlying tort action. **Smith v. USAA Cas. Ins. Co., 40.**

DIVORCE

Alimony—calculation of amount—An award of alimony arrears was remanded for calculation of the correct amount owed. **Hill v. Hill, 600.**

Equitable distribution—classification—marital versus separate property—house—In a equitable distribution action, the trial court erred in distributing the parties' home to the wife after finding that the home was separate property. Since only marital property may be distributed in equitable distribution, the trial court was instructed on remand to classify and value the home and any marital or separate interests in the home and then distribute any marital interest. **Watson v. Watson, 94.**

Equitable distribution—marital property—unequal distribution—liquid assets—In an equitable distribution action that was remanded for errors in classification and valuation of the parties' property, the trial court also abused its discretion in ordering an unequal distribution of marital property using the distributional factors in N.C.G.S. § 50-20(c) without a proper valuation of marital assets and upon a misunderstanding of the difference between liquid and nonliquid assets. **Watson v. Watson, 94.**

Equitable distribution—valuation—car—In an equitable distribution action, the trial court erred in valuing a Cadillac El Dorado at \$10,000 as of the date of separation where there was no evidence to support that valuation as the fair market value on the date of separation, and where the only evidence appeared to be that the car's value was \$1,880 on the relevant date. **Watson v. Watson, 94.**

Equitable distribution—valuation—home equity—401(k)—In an equitable distribution action, the trial court's determination that an unequal distribution was equitable was not based on a proper classification and valuation of assets, including a home equity line of credit (HELOC) taken out by the husband and the husband's 401(k). The trial court classified the HELOC as a separate debt but then stated there was no evidence of its value despite not needing to distribute it; conversely, the trial court classified the 401(k) as marital debt but did not value it, as it would need to do before distribution. Finally, where the trial court erroneously found the parties separated in 2007, and not 2009, its determination that there was no evidence of the value of the 401(k) at the date of separation despite a letter from the plan administrator dated 2009 with the account's value may or may have been prejudicial, depending on whether the court chose not to rely on the letter for a reason other than the misapprehension about the correct date of separation. There is no way to know if an unequal distribution of the marital estate is equitable if there is no finding on the net value of the entire marital estate. **Watson v. Watson, 94.**

DRUGS

Possession of heroin—identification of substance—sufficiency of evidence—The State failed to present sufficient evidence to prove defendant possessed heroin even though defendant told an investigating officer that she had ingested heroin, several investigating officers identified the substance seized in defendant's hotel room as heroin, a field test of the substance was positive for heroin, and drug paraphernalia typically used for heroin was found in the hotel room. Without evidence that a scientifically valid chemical analysis was performed to identify the seized substance as heroin, the State did not meet its burden of proof beyond a reasonable doubt. **State v. Osborne, 710.**

EASEMENTS

By prescription—rebuttable presumption of permissive use—regular use and upkeep—In an action to establish access to a gravel road separating adjacent properties, a private citizen neighbor established a prescriptive easement claim by rebutting the presumption that his use of a private road across defendants' property was permissive by showing that he maintained a private right of way across the eastern edge of defendants' property through regular use to access his own property and regular physical maintenance of the road. However, the trial court erred by entering a permanent injunction enjoining defendants from taking any measures that would prevent trespassers from using the road. **Town of Carrboro v. Slack, 525.**

Express easement by reservation—necessary language in deed—In an action to establish access to a gravel road separating adjacent properties, plaintiffs failed to show that an express easement by reservation was created where none of the deeds in the defendants' chain of title contained any reservation or exception. Although all the deeds in defendant landowners' chain of title referenced a "private road" on the eastern edge of their property, none had language indicating an intent to withhold a portion of the conveyance so as to create an easement by reservation. **Town of Carrboro v. Slack, 525.**

Implied easement by dedication—public use—sufficiency of evidence—In an action to establish access to a gravel road separating adjacent properties, plaintiffs failed to show possession of an implied easement by dedication by which deeds referencing a "private road" could be construed to create an easement for public use where the recorded instruments themselves did not indicate an intent to create such an easement, no public authority expressly or implicitly accepted a dedication, and the actions of the landowners were not consistent with an intent to create one. **Town of Carrboro v. Slack, 525.**

Implied easement by estoppel—equity arguments—inducement and reliance required—In an action to establish access to a gravel road separating adjacent properties, government plaintiffs failed to show they possessed an implied easement by estoppel because they could not show they were innocently and ignorantly induced by defendants to believe they possessed an easement before making plans for development of their land. Further, government plaintiffs' own actions in approving defendants' request to build a bioretention basin in the path of the purported easement undermined its argument for equitable consideration. **Town of Carrboro v. Slack, 525.**

Implied easement by plat—conveyance necessary—In an action to establish access to a gravel road separating adjacent properties, plaintiffs failed to show an implied easement by plat because defendants never conveyed any property to them, undermining the argument that defendants should be estopped from denying the existence of an easement plaintiffs relied on when purchasing their property. **Town of Carrboro v. Slack, 525.**

Prior transaction—third parties—intent to create express easement appurtenant—valid only between owners—In an action to establish access to a gravel road separating adjacent properties, a prior transaction by a landowner granting an easement to non-landowner third parties merely created an easement in gross as to those third parties, and not an easement appurtenant running with the land. To create an easement appurtenant, the easement must be granted by the owner of the servient estate and accepted by the owner of the dominant (benefiting) estate. **Town of Carrboro v. Slack, 525.**

EMBEZZLEMENT

Entrustment of funds—supervisor's security device—The State presented sufficient evidence to convict defendant of embezzling funds from her employer where defendant was the director of accounting for a state university foundation and was entrusted with her own security device and her supervisor's security device, both of which were required in order to access the employer's funds. The bank's intent to require two foundation employees to participate in each transaction as a security measure did not negate the fact that defendant's employer entrusted her with its funds and both security devices. **State v. Grandy, 691.**

EQUITY

Constructive trust—proper basis—necessary elements—Plaintiff failed to state a claim that her deceased brother's sister-in-law (defendant), to whom he devised his house, held the house in constructive trust for plaintiff due to an apparent oral agreement that the brother intended plaintiff to have the house. A constructive trust cannot be based on an unenforceable oral agreement to devise real property, and plaintiff failed to show that defendant acquired the house through fraud, breach of duty, or other wrongdoing. **Barrett v. Coston, 311.**

Reformation of deed of trust—unclean hands—collateral matters—In an action to reform a deed of trust that was inadvertently recorded without the necessary property description attached, the doctrine of unclean hands did not bar the reformation claim asserted by the holder of the note, where the alleged oral agreements with the mortgagors to restructure and modify the loan were made years after the deed of trust was executed and were therefore wholly collateral to the transaction for which relief was sought. **Nationstar Mortg., LLC v. Dean, 375.**

EVIDENCE

Character—other crimes, wrongs, or acts—photographs—guns—hand gestures—The trial court did not abuse its discretion by admitting photographs obtained from defendant's phone showing guns and showing defendant making certain hand gestures. Gun ownership is constitutionally protected and not indicative of bad character, and the hand gestures did not indicate gang affiliation despite defendant's argument otherwise. In any event, the trial court instructed the State not to ask any questions about signs or gang affiliation based on the photo of the hand gestures. **State v. Dixon, 676.**

Cross-examination—limits—matters raised during direct examination—In a trial for multiple offenses arising from the abduction and assault of a six-year-old girl, the trial court abused its discretion by limiting defendant's cross-examination of the State's witnesses about his post-arrest interrogation after the State elicited evidence regarding defendant's questioning the night before he was arrested. The trial court did not adhere to Rule of Evidence 611, which does not limit cross-examination to relevant matters raised during direct examination. However, the error was not prejudicial to defendant's case given the overwhelming evidence of defendant's guilt and the fact that the jury heard the evidence defendant sought to admit when he testified on his own behalf. **State v. Edwards, 459.**

Expert testimony—reliability—relevance—forensic custody evaluation—The trial court did not abuse its discretion in a child custody action by admitting a forensic custody evaluator's testimony and report regarding her evaluation of the family. The testimony and report were relevant and reliable pursuant to Rule of

EVIDENCE—Continued

Evidence 702(a) where the evaluator spent approximately one year conducting her evaluation, issued a 43-page report, and explained the principles and methods used in conducting the evaluation. **Sneed v. Sneed, 448.**

Expert witness testimony—eyewitness identification—The trial court did not abuse its discretion by partially sustaining the State's objection to expert witness testimony on memory perception and eyewitness identification. The expert witness testified in a voir dire hearing that four factors were present that could affect the eyewitness identifications in this case, but the trial court ruled that two of them were such elementary, commonsense concepts and that expert testimony on those factors would be of no help to the jury. **State v. Vann, 724.**

False pretense in obtaining bail bond license—selective prosecution—questioning of former insurance commissioner limited—The trial court did not erroneously limit questioning of a former insurance commissioner by a bail bondsman accused of obtaining property (his license) by false representations. The trial court affected defendant, who appeared pro se and alleged selective prosecution, to ask questions which would bring forth relevant testimony and then allowed defendant to ask several more questions of the witness. **State v. Mathis, 263.**

Hearsay—credentials of successful job applicant—business records exception—The administrative law judge did not err in an action by a State employee who was an unsuccessful candidate for a State job by admitting the successful applicant's credentials, which were presented on notes and paper the hiring officials had compiled. The evidence showed that the job applications and other information about applicant qualifications were kept in the course of a regularly conducted business activity. The focus was on the authentication of the records, including the information collected as part of the regular hiring process, not on who made them. **Weaver v. N.C. Dep't of Health & Human Servs., 293.**

Hearsay—exceptions—residual—notice—Where the trial court admitted under the hearsay rule's residual exception out-of-court statements by defendant's daughters regarding his sexual abuse of them, the State provided sufficient notice of the statements—which had already been provided to defendant months earlier—by sending written notice between 1 week and 7 months before the statements were introduced at the various court proceedings on the matter. **In re W.H., 24.**

Hearsay—exceptions—residual—trustworthiness—Where the trial court admitted under the hearsay rule's residual exception out-of-court statements by defendant's daughters regarding his sexual abuse of them, the trial court did not abuse its discretion in determining the statements were trustworthy. Even though the trial court's findings failed to mention that the daughters recanted their allegations, this failure was not fatal, and the trial court made numerous findings in determining the statements were trustworthy. **In re W.H., 24.**

Hearsay—exceptions—residual—unavailability—Where the trial court admitted under the hearsay rule's residual exception out-of-court statements by defendant's daughters regarding his sexual abuse of them, the trial court did not err by determining that the daughters were unavailable to testify on the grounds that testifying would traumatize them, would cause them confusion, and would create a risk that they would be untruthful out of guilt and fear. These findings were not inconsistent with the finding that their out-of-court statements were trustworthy. **In re W.H., 24.**

EVIDENCE—Continued

Hearsay—exceptions—then-existing mental, emotional, or physical condition—letter concerning assaults by defendant—In a first-degree murder trial, the trial court did not abuse its discretion by admitting a document hand-written by the victim listing things she wanted to tell defendant regarding defendant's assaults upon her, including an assault with frozen meat four months earlier. The trial court reasonably concluded that the document was relevant to show the victim's state of mind around the time of the murder and was not unfairly prejudicial. **State v. Enoch, 474.**

Motion to strike—affidavits—prejudice analysis—In an action to reform a deed of trust that was inadvertently recorded without the necessary property description attached, even assuming arguendo the trial court erred by overruling motions to strike affidavits supportive of the holder of the note (the party seeking reformation), borrowers were not prejudiced because the holder of the note was entitled to summary judgment on its reformation claim. **Nationstar Mortg., LLC v. Dean, 375.**

Motions to suppress—oral findings of fact—sufficiency—In a first-degree murder trial, the trial court did not err by making oral findings of fact regarding multiple pretrial motions to suppress even though it had ordered the State to prepare written motions, which it failed to do, because there were no conflicts in the evidence requiring the court to make any findings of fact, much less written ones, and the detailed findings were sufficient to support the conclusions of law. While the trial court referred to its oral findings as "sketches" that could be supplemented with proposed findings offered by the parties, nothing in the record suggested the judge had not made up his mind or intended to enter a written order contrary to the facts found and conclusions already reached. **State v. Dixon, 676.**

Other crimes, wrongs, or acts—prior abusive relationships—similar patterns of assaults—time gap—In a first-degree murder trial, the testimony of two women regarding their prior abusive relationships with defendant was admissible pursuant to Rule of Evidence 404(b) to show motive, intent, modus operandi, and identity. The murder victim had been in an abusive relationship with defendant and was found stabbed to death in an isolated area, and the two witnesses testified to similar patterns of assaults by defendant. A nine-year gap between the assaults and the murder did not render the testimony inadmissible. **State v. Enoch, 474.**

Photographs of firearms, weapons, surveillance equipment—irrelevant—prejudice outweighed by other evidence—In a stalking prosecution, photographs of legally owned firearms, ammunition, and surveillance equipment found in defendant's home were irrelevant, and the probative value of the evidence was outweighed by the danger of unfair prejudice. The trial court abused its discretion in admitting the photographs; however, in light of the overwhelming other evidence, the admission of the photographs did not amount to prejudicial error. **State v. Hobson, 60.**

Relevance—danger of unfair prejudice—skeletal remains—The trial court in a first-degree murder trial did not abuse its discretion by admitting the skeletal remains of the victim. The remains were relevant and more probative than prejudicial where the skull proved the victim's identity and illustrated the testimony of the hunter who found the remains, the rib bones showed the nature and number of the victim's fatal wounds, and the femur showed the biological item used to establish the victim's identity through DNA testing. Further, defendant failed to show that any prejudice resulted from the alleged error. **State v. Enoch, 474.**

Relevance—photographs—guns—location of shooting—The trial court did not abuse its discretion by admitting photographs showing guns and showing defendant

EVIDENCE—Continued

making certain hand gestures, because the photographs were obtained from defendant's phone, showed he had access to firearms, and depicted him at nearly the same location where the shooting occurred, making them relevant to defendant's charges of felony murder and discharging a firearm into an occupied vehicle. **State v. Dixon, 676.**

Relevance—prejudicial and probative value—unrelated sexual assault—In defendant's trial for sexual offenses committed against his daughter, the trial court did not err by excluding defendant's proposed testimony concerning the rape of his other daughter by a neighbor, under Rules of Evidence 401 and 403. Defendant failed to show how the testimony would have a logical tendency to prove that he did not molest his daughter or how his wife's reporting of the rape by the neighbor would make her more likely to report the molestation by her husband; further, the testimony likely would have confused the jury. **State v. Alonzo, 51.**

Stalking prosecution—domestic violence protective order—redacted—prejudice analysis—The trial court did not abuse its discretion in a stalking prosecution by admitting domestic violence protective orders and related findings where the trial court redacted the orders and gave limiting instructions. **State v. Hobson, 60.**

Stalking—testimony of incidents with another woman—plain error analysis—The trial court did not plainly err in a stalking prosecution by admitting the testimony of defendant's prior girlfriend regarding his assault on her, and relating her communications with the prosecuting victim, where the challenged portions of the prior girlfriend's testimony were relevant not only to show defendant's propensity for stalking but to show that the prosecuting victim was in reasonable fear of defendant. **State v. Hobson, 60.**

Telephone conversation—Rule of Completeness—The trial court did not abuse its discretion in a prosecution for shooting a convenience store clerk by sustaining the State's objection to portions of defendant's jailhouse telephone call with his grandmother. Portions of the telephone call showing defendant's knowledge of the crime were admitted and defendant argued that other portions of the conversation should have been admitted under the Rule of Completeness. The trial court noted that admitting the additional evidence could open the door to admission of other clearly inadmissible parts of the conversation. **State v. Vann, 724.**

Written statement of third party—no objection—consent to admission—The admission of a written statement by a third party in defendant's trial for multiple drug offenses did not amount to plain error where defendant elicited testimony about the statement on cross-examination of a State witness prior to its introduction, and did not object to and expressly consented to its admission. **State v. Bice, 664.**

FALSE PRETENSE

Obtaining something of value—bail bond license—causation with false representation—The trial court erred by denying a bail bondsman's motion to dismiss an obtaining property by false pretenses charge arising from his submission of computerized reports to the State. Defendant already had his bail bondsman's license; while the State likens obtaining to retaining, retain is not within the definition of obtain. The Department of Insurance has different processes and requirements for the two, and the assertion that defendant obtained a renewal is not what the State alleged in the indictment. **State v. Mathis, 263.**

FIREARMS AND OTHER WEAPONS

Discharging a firearm into an occupied vehicle—self-defense—jury instruction—The trial court was required to instruct the jury on self-defense in a trial for discharging a firearm into an occupied and operating vehicle, because the evidence gave rise to a reasonable inference that defendant was acting in self-defense when he shot the tire of a truck that was persistently tailgating him and had veered into his lane, forcing him past the edge of the pavement. Self-defense instructions are available in prosecutions for general intent crimes where the evidence shows intentional conduct by the perpetrator to commit the act, even if there is no intention to cause harm. **State v. Ayers, 220.**

Discharging a firearm into an occupied vehicle—self-defense—jury instruction—no duty to retreat—In a prosecution for discharging a firearm into an occupied vehicle arising from a defendant shooting the tire of an adjacent vehicle to prevent being run off the road, defendant was entitled to a jury instruction on self-defense, including language that defendant had no duty to retreat from a place where he had a lawful right to be, where the evidence showed that the aggressor motorist was persistently tailgating defendant's vehicle on a public road, he paced defendant's vehicle rather than passing when given the opportunity, and veered into defendant's lane, forcing him past the edge of the pavement. **State v. Ayers, 220.**

FRAUD

Common law—real property transaction—justifiable reliance—In a complex business case involving the sale of tenant-in-common like-kind interests in multiple parcels of real property, the business court did not err in dismissing plaintiff purchasers' common law claims asserted against the seller and broker (defendants) for common law fraud, fraud in the inducement, or negligent misrepresentation because plaintiffs' theory of indirect reliance was not sufficient to meet the element that they justifiably relied on defendants' misrepresentations which were passed through a third-party investment company. Plaintiffs could not transfer reliance that the third-party investment company placed on defendants' confidential offering memorandum (COM) to plaintiffs' own reliance on the private-placement memorandum drafted by the third party, where the two memoranda contained different lease renewal probabilities affecting the analysis of cash flow projections from the properties' commercial tenants, undermining plaintiffs' claims, and there was no allegation or evidence that any of the plaintiffs saw the COM itself. **NNN Durham Office Portfolio 1, LLC v. Highwoods Realty Ltd. P'ship, 185.**

Elements of claim—purchase of business—internet sweepstakes—The trial court did not err by finding that plaintiff buyer's reliance on any misrepresentation or concealment of fact by defendant seller was unreasonable as a matter of law. Plaintiff was well aware of the risks of the internet sweepstakes business and failed to exercise due diligence when she did not inquire of law enforcement about the legality of the business she was purchasing. **Thompson v. Bass, 285.**

HOMICIDE

Identity of perpetrator—relevant circumstances—motive and opportunity—sufficiency of evidence—The State presented sufficient physical evidence and testimony regarding defendant's motive and opportunity from which the jury could reasonably infer he was the person who fatally shot the victim, or that he was present when the victim was shot, to overcome defendant's motion to dismiss his charges for first-degree murder and discharging a weapon into an occupied dwelling. **State v. Gray, 499.**

IDENTIFICATION OF DEFENDANTS

In-court identification—findings and conclusions—sufficiency—The trial court did not err in admitting a witness's in-court identification of defendant as the perpetrator of her fiancé's murder because there was no conflict in the evidence requiring express factual findings on the alleged absence of a completed witness confidence statement at a photo lineup or the witness's inability to choose between a photo of defendant and that of another man in the photo lineup, nor was there any evidence that the witness heard defendant's name prior to being shown the photo lineup. The court properly concluded the evidence was relevant, admissible, and sufficient to go to the jury for a credibility determination. **State v. Dixon, 676.**

INDICTMENT AND INFORMATION

Unlawfully accessing government computer—sufficiency of indictment—An indictment against a bail bondsman for unlawfully accessing a government computer was sufficient even though defendant contended that his inadvertent failure to accurately report his transactions could not be considered intentional because the State compelled him to complete and submit monthly reports. That argument had no bearing on the validity of the indictment. **State v. Mathis, 263.**

JURISDICTION

Reformation of deed of trust—standing—holder of instrument—In an action to reform a deed of trust that was inadvertently recorded without the necessary property description attached, the bank holding the note had standing to seek reformation even if it did not own the note, since the holder of a note qualifies as a real party in interest which may enforce the note and the deed of trust. **Nationstar Mortg., LLC v. Dean, 375.**

Standing—county board of education—intended beneficiary of funds—A county board of education had standing to bring an action against the N.C. attorney general alleging a violation of the state constitution for failure to use certain funds for public education, because, viewing the allegations in the light most favorable to the board of education, the board would be an intended beneficiary of the funds at issue. **De Luca v. Stein, 118.**

Standing—order regarding standing not appealed—merits considered on appeal—The Court of Appeals considered the merits of an argument that plaintiffs lacked standing in a lawsuit against the attorney general—even though defendant parties did not appeal from the trial court's earlier order concluding plaintiffs had standing—because standing is an issue of subject matter jurisdiction and can be raised at any time. **De Luca v. Stein, 118.**

Standing—taxpayer—funds for public education—allegations of basis for standing—A North Carolina citizen lacked standing to bring an action against the state attorney general alleging a violation of the state constitution for failure to use certain funds for public education, where that citizen failed to allege any basis upon which he could sue solely in his capacity as a taxpayer. **De Luca v. Stein, 118.**

Subject matter—modification of order by trial court—during pendency of appeal—The trial court in an equitable distribution case lacked subject matter jurisdiction to enter an order modifying the language of a prior equitable order directing the distribution of the husband's retirement account, where the prior order had been appealed to the Court of Appeals and that court's mandate had not yet issued. **Henson v. Henson, 157.**

JURISDICTION—Continued

Tort claims—tangentially related to worker's compensation claim—trial court divisions—Tort claims including malicious prosecution asserted by an employee against an insurance company and others arising from a criminal prosecution against him for obtaining worker's compensation benefits by false pretenses, while tangentially related to the employee's worker's compensation claim, were properly brought in the superior court. The N.C. Industrial Commission has exclusive jurisdiction only for claims arising from the processing and handling of a worker's compensation claim, whether intentional or negligent, but its jurisdiction does not extend to claims based on acts occurring outside the course of a worker's compensation proceeding. **Seguro-Suarez v. Key Risk Ins. Co.**, 200.

JURY

Rehabilitation—noncapital murder trial—trial court's discretion—During jury selection for a noncapital first-degree murder trial, the trial court properly exercised its discretion when it denied defendant's request to rehabilitate certain jurors in order to keep them on the jury, where the trial court stated that rehabilitation was "potentially allow[ed]" but "generally not done" in noncapital cases. **State v. Enoch**, 474.

JUVENILES

Delinquency—adjudication—right against self-incrimination—statutory mandate—The trial court erred in a juvenile delinquency adjudication by failing to advise the juvenile of his constitutional right against self-incrimination before he testified. The trial court's violation of the statutory mandate in N.C.G.S. § 7B-2405 required reversal where the juvenile's testimony admitting that he threw a pint of milk at his teacher was incriminating and therefore prejudicial. **In re J.B.**, 371.

LICENSING BOARDS

Disciplinary action—plumbing, heating, and fire sprinkler contractors—attorney fees—N.C.G.S. § 6-19.1—In an action to discipline a contractor (petitioner) who performed work beyond his license qualification, the trial court erred in awarding him attorney fees pursuant to N.C.G.S. § 6-19.1 after his attorney successfully defended him against one of two allegations of misconduct. Based on both the plain language of the statute and legislative intent, section 6-19.1 excludes claims for attorney fees incurred in disciplinary actions by licensing boards from that statute's provisions. **Winkler v. N.C. State Bd. of Plumbing, Heating & Fire Sprinkler Contractors**, 106.

MALICIOUS PROSECUTION

Initiation of prosecution—intervening independent prosecutorial discretion—motivation for providing information to law enforcement—Plaintiff's complaint for malicious prosecution contained sufficient allegations that defendants initiated prosecution against him, by alleging defendants knowingly provided incomplete, false, and misleading information to law enforcement which caused plaintiff to be charged with obtaining property by false pretenses and insurance fraud for pursuing worker's compensation benefits. Although law enforcement and prosecutors exercise discretion in deciding which cases to prosecute, a person who knowingly provides false information to authorities may be found to have initiated prosecution,

MALICIOUS PROSECUTION—Continued

and is not protected by the rule that citizens who make reports in good faith, even if incompletely or inaccurately, may do so without fear of retaliation. **Seguro-Suarez v. Key Risk Ins. Co.**, 200.

MEDICAL MALPRACTICE

Pleadings—Rule 9(j)—review of all medical records—Where plaintiffs' Rule 9(j) certification in their medical malpractice complaint stated that their proposed expert witness had reviewed "certain"—instead of "all"—medical records pertaining to the alleged negligence, the trial court properly dismissed the complaint for noncompliance with Rule 9(j). **Fairfield v. WakeMed**, 569.

Wrongful conception—child with cystic fibrosis—dismissal of complaint—Where plaintiffs filed a medical malpractice action for a doctor's negligence in misinterpreting plaintiff mother's cystic fibrosis (CF) genetic testing results, which led to the conception and birth of a child with CF, plaintiffs' complaint stated a claim upon which relief may be granted for medical malpractice, negligent infliction of emotional distress, and economic damages. **Glover v. Charlotte-Mecklenburg Hosp. Auth.**, 345.

MORTGAGES AND DEEDS OF TRUST

Foreclosure—power of sale—lost note—The trial court properly concluded that CitiMortgage, Inc. was the holder of a note and was entitled to proceed with a power of sale foreclosure on respondents' home where affidavits of a CitiMortgage loan officer satisfied the three-part test for entitlement to enforce a lost instrument pursuant to UCC § 25-3-309. **In re Foreclosure of Frucella**, 632.

MOTOR VEHICLES

Driving while impaired—statutory requirements—detention—written findings—In a driving while impaired case, the Court of Appeals rejected defendant's argument that her motion to dismiss should have been granted on the basis that the magistrate violated N.C.G.S. § 15A-534 by accidentally deleting from his order written findings regarding his reasons for imposing a secured bond. Defendant failed to demonstrate irreparable prejudice to the preparation of her case where the trial court's findings, supported by competent evidence, showed that the magistrate considered the statutory factors before setting a secured bond and before ordering defendant to be held until a certain time unless released to a sober adult. **State v. Ledbetter**, 71.

Driving while impaired—statutory requirements—procedure to observe condition—oral notice—In a driving while impaired case, defendant did not show irreparable prejudice to the preparation of her case due to the magistrate's failure to inform her in writing of her right under N.C.G.S. § 20-38.4 to have witnesses appear at the jail to observe her condition. Although the magistrate did not fully comply with the statute's requirements, the magistrate did orally inform defendant of the right to have her condition observed, and defendant was allowed to make several phone calls to friends and family after being detained. **State v. Ledbetter**, 71.

PARTIES

Necessary—declaratory judgment determining insurance obligation—A summary judgment in an action to determine insurance coverage after an automobile accident was vacated and remanded for the joinder of necessary parties. The accident occurred the night after the used vehicle was purchased. While the car dealership and a credit leasing company acted as if the dealer was the owner of the vehicle, ownership was still with the latter entity when the accident occurred and neither it nor any of its insurers were made parties to the action. **Smith v. USAA Cas. Ins. Co.**, 40.

PUBLIC OFFICERS AND EMPLOYEES

Career status—dismissal—just cause—Where a career status State employee engaged in a pattern of petulant, inappropriate, and insubordinate behavior throughout several years of his employment, his unacceptable personal conduct gave rise to just cause for his dismissal. The administrative law judge's factual findings supported this conclusion, including findings concerning the employee's work history that were not expressly referenced within the dismissal letter. **Smith v. N.C. Dep't of Pub. Instruction**, 430.

Career status—dismissal—unacceptable personal conduct—A dismissed career State employee's behavior constituted unacceptable personal conduct under the Human Resources Act where he engaged in a loud confrontation with a female colleague over his dissatisfaction with a planned "Ugly Christmas Sweater" contest; he behaved inappropriately while conducting an interview by, among other things, expressing his dissatisfaction with his supervisor to the interviewee and stating that he was considering filing a lawsuit against his employer; and by "liking" two sexually suggestive social media posts while using an account in which he identified himself as an employee of the Department of Public Instruction. **Smith v. N.C. Dep't of Pub. Instruction**, 430.

Social services worker—dismissal—just cause—An administrative law judge correctly determined that a department of social services (respondent) had just cause to terminate the employment of a social services technician (petitioner) who provided transportation for children who were under the agency's supervision, supervised parental visits, and reported the details of visits to social workers. Petitioner accepted a gift of jewelry from a foster child through a parent, allowed parents and/or children to buy her food, bought items for herself using money intended for a child's group home, accepted cash from a parent, and gave a bassinets to a foster parent without permission. Petitioner was notified in a termination letter that respondent believed she had engaged in unacceptable personal conduct, and she was given an opportunity in a contested case hearing to dispute whether those specific acts occurred as a matter of fact and whether they constituted unacceptable personal conduct as a matter of law. **Watlington v. Dep't of Soc. Servs. Rockingham Cty.**, 760.

State employee—priority consideration—minimum qualifications—An administrative law judge did not err by concluding that a State employee (petitioner) who was an unsuccessful candidate for a State job did not have substantially equal qualifications to the successful applicant. Moreover, petitioner did not meet the minimum qualifications for the job and did not qualify for priority consideration. **Weaver v. N.C. Dep't of Health & Human Servs.**, 293.

PUBLIC OFFICERS AND EMPLOYEES—Continued

State employee—promotion not received—qualifications—findings—The administrative law judge did not err by finding that an unsuccessful applicant for a State job lacked the minimum qualifications in that she did not have supervisory experience. Even though petitioner had taken on more responsibility at times and had done a portion of the supervisor's work, she had no official managerial or supervisory role and did not evaluate, hire, or fire employees. Although petitioner pointed toward "or equivalent" language in the posting, there were several versions of the posting and the person who wrote the knowledge, skills, and ability portion of the job description testified that this portion of the job description never stated that an equivalency would be acceptable. **Weaver v. N.C. Dep't of Health & Human Servs.**, 293.

State employee—unsuccessful applicant—qualifications—findings—The administrative law judge did not err in a proceeding by a State employee who unsuccessfully sought a job promotion by finding that the focus on filling the position was more on the supervisory and managerial aspects of the position than the technical aspects. Also, testimony that someone was promoted to a supervisory position without supervisory experience was based on a ten-year-old hiring decision. **Weaver v. N.C. Dep't of Health & Human Servs.**, 293.

RAPE

First-degree—sufficiency of evidence—The State presented sufficient evidence to withstand defendant's motion to dismiss the charge of first-degree rape where multiple eyewitnesses identified defendant as the man straddling the victim in an alley and there was debris and a small black hair inside the victim's vaginal canal. **State v. White**, 506.

REAL PROPERTY

Securities Act—primary liability claims—sufficiency of claims—In a complex business case involving the sale of tenant-in-common (TIC) like-kind interests in multiple parcels of real property, the business court did not err in dismissing plaintiff purchasers' primary liability claims asserted against the seller and broker (defendants) under the Securities Act because the transfer of the real property deed did not constitute the sale of a security. The TIC interests were created, offered, and sold to plaintiffs from a third-party entity, which provided the investment materials plaintiffs relied on. Plaintiffs did not state a proper claim under the Act because they did not allege that defendants solicited plaintiffs or promoted the sale of TIC interests in order to sell them securities. **NNN Durham Office Portfolio 1, LLC v. Highwoods Realty Ltd. P'ship**, 185.

Securities Act—secondary liability claims—N.C.G.S. § 78A-56(c)—material aid—In a complex business case involving the sale of tenant-in-common like-kind interests in multiple parcels of real property, the business court did not err in granting summary judgment for a seller and broker (defendants) on plaintiff purchasers' secondary liability claims under section 78A-56(c) of the Securities Act after determining that defendants did not materially aid a third-party investment company's presentation of facts regarding the properties in its private-placement memorandum (PPM) which plaintiffs relied on when deciding to purchase. No argument was made or evidence presented to indicate that defendants owed a duty to make any disclosures directly to plaintiffs, nor was there proof that defendants actually knew of

REAL PROPERTY—Continued

any alleged misrepresentations in the PPM. **NNN Durham Office Portfolio 1, LLC v. Highwoods Realty Ltd. P’ship, 185.**

Settlement agreement—assertion of claims—interpretation—notice requirement—Pursuant to the plain language of the terms of a settlement agreement, plaintiff property owners were required not only to file a legal action but also to notify defendant property managers by a date certain in order to “duly and timely assert” their claims for damages after a loan default resulted in foreclosure. The trial court should have dismissed all of plaintiffs’ claims as being barred by the settlement agreement because plaintiffs timely filed a claim but did not notify defendants until after the due diligence period specified in the agreement. **NNN Durham Office Portfolio 1, LLC v. Grubb & Ellis Co., 175.**

Statute of Frauds—applicability—agreement to devise house—Plaintiff did not prevail in her argument that her deceased brother intended to leave her his house pursuant to an oral agreement, or in her request for equitable relief on multiple bases, because the Statute of Frauds requires any agreement to devise real property to be in writing. **Barrett v. Coston, 311.**

RECEIVERSHIP

Standing—non-parties to underlying action—The trial court erred in a receivership hearing by considering the arguments of third parties (an auto insurer and its attorney) against whom the judgment debtor (defendant) had unliquidated legal claims. The third parties were not parties to the action between plaintiff and defendant, and they had no standing to object to the appointment of a receiver. **Haarhuis v. Cheek, 358.**

Unliquidated legal claims against third parties—judgment debtor’s refusal to pursue—In a case arising from the death of a pedestrian whom defendant hit and killed while driving impaired, the trial court erred by denying plaintiff estate administrator’s Motion for Appointment of Receiver over defendant’s unliquidated legal claims against third parties. Equity required appointment of a receiver where the third parties (defendant’s auto insurer and its attorney) allowed a \$50,000 settlement offer from plaintiff to expire, which led to defendant being encumbered with a \$4.3 million judgment; defendant had no ability to satisfy the judgment; and defendant refused to pursue legal claims against the insurer and attorney for their actions. **Haarhuis v. Cheek, 358.**

REFORMATION OF INSTRUMENTS

Deed of trust—mutual intention to encumber property—In an action to reform a deed of trust that was inadvertently recorded without the necessary property description attached, borrowers did not present evidence to rebut the presumption that the deed was intended by both borrowers and the bank to encumber the property as a first lien. **Nationstar Mortg., LLC v. Dean, 375.**

Mutual mistake—sufficiency of facts—Plaintiff failed to show that her deceased brother’s 2016 deed conveying his condominium to his sister-in-law (defendant) should be reformed based on mutual mistake where he made an oral agreement to give plaintiff his house upon his death but never changed his 2012 will, which left the house to defendant. Plaintiff did not rebut the presumption that her brother understood the consequences of the deed, which was only effective to convey the condo

REFORMATION OF INSTRUMENTS—Continued

to defendant but not to convey the house to plaintiff, nor did she show that any other mistake was made in the property conveyances. **Barrett v. Coston, 311.**

SATELLITE-BASED MONITORING

Constitutionality of search—hearing required—The trial court erred by ordering defendant to enroll in satellite-based monitoring (SBM) upon his release from imprisonment without first conducting a hearing to determine the constitutionality of subjecting defendant to SBM, requiring the order to be vacated and the case to be remanded for a hearing on the matter. **State v. White, 506.**

Enrollment upon release from prison—constitutionality as applied—A trial court order enrolling defendant in satellite-based monitoring (SBM) upon his release from prison was unconstitutional as applied where his sentence consisted of 190 to 288 months in prison and lifetime sex-offender registration. Enrollment of an individual in North Carolina's SBM program constitutes a search for purposes of the Fourth Amendment and the State did not establish the circumstances necessary for the trial court to determine the reasonableness of a search fifteen to twenty years before its execution. **State v. Gordon, 247.**

SEARCH AND SEIZURE

Curtilage—reasonable expectation of privacy—location of car—on public street and outside of home's fence—The trial court erred in its order denying defendant's motion to suppress contraband found in his vehicle by concluding that the vehicle was parked in the curtilage of defendant's home. The vehicle was parked on the side of a public street opposite the home and outside of the fence that surrounded the home—not in a place where defendant had a reasonable expectation of privacy. **State v. Degraphenreed, 235.**

Warrantless searches—totality of the circumstances—vehicle—Police officers had probable cause to conduct a warrantless search of the trunk of defendant's vehicle, which was parked on a public street, where a confidential reliable informant had made controlled purchases from defendant near the vehicle, defendant was in possession of the vehicle's keys when officers executed a search warrant of his home, and a police K-9 alerted for narcotics next to the vehicle. **State v. Degraphenreed, 235.**

SENTENCING

Aggravating factors—sufficiency of notice—statutory procedure—In a case involving multiple offenses arising from the abduction and assault of a six-year-old girl, the Court of Appeals rejected defendant's arguments that aggravating factors must be alleged in an indictment, and that the jury instruction for the aggravating factor of "heinous, atrocious, or cruel" was unconstitutionally vague. The State complied with N.C.G.S. § 15A-1360.16 by giving defendant written notice of the aggravating factors it intended to prove, a procedure that conforms with U.S. Supreme Court precedent. The latter argument has been rejected previously by the N.C. Supreme Court. **State v. Edwards, 459.**

SEXUAL OFFENSES

Felonious child abuse by sexual act—jury instructions—pattern instructions inconsistent with case law—Although the definition of “sexual act” in the Pattern Jury Instructions for felonious child abuse by sexual act was inconsistent with controlling case law, the trial court’s error in utilizing the inaccurate Pattern Jury Instructions in defendant’s case did not rise to the level of plain error because defendant’s argument regarding inconsistent verdicts was not convincing that, absent the error, the jury probably would have reached a different result. **State v. Alonzo**, 51.

STALKING

Jurisdiction—subject matter—indictment—presentment—Although defendant argued that the trial court lacked subject matter jurisdiction over a misdemeanor charge of stalking because the charge was not initiated by a presentment prior to indictment, the amended record on appeal contained a certified copy of the presentment. **State v. Hobson**, 60.

Motion to dismiss—sufficiency of the evidence—defendant as perpetrator—The trial court did not err by denying defendant’s motion to dismiss a charge of misdemeanor stalking where defendant contended that he was not the perpetrator. There was testimony from defendant’s previous girlfriend that he had mailed derogatory flyers. **State v. Hobson**, 60.

STATUTES OF LIMITATION AND REPOSE

Medical malpractice—continuing course of treatment doctrine—misinterpretation of genetic testing results—last act giving rise to claim—A medical malpractice action for negligence in misinterpreting a patient’s cystic fibrosis (CF) genetic testing results was not barred by the four-year statute of repose in N.C.G.S. § 1-15(c) where defendant OB/GYN doctor’s last act giving rise to the claim was not the initial misinterpretation of the CF test results but rather a later preconception appointment before plaintiffs’ child with CF was conceived. The continuing course of treatment doctrine applied because the doctor had a continuing professional duty to care for plaintiffs, based on their ongoing family planning and health needs, and he continued the wrongful treatment over time without correction after his initial misinterpretation of the CF test results. **Glover v. Charlotte-Mecklenburg Hosp. Auth.**, 345.

Reformation of deed of trust—applicable statute of limitation—In an action to reform a deed of trust that was inadvertently recorded without the necessary property description attached, the applicable statute of limitations was the more specific statute regarding sealed instruments (N.C.G.S. § 1-47(2), a ten-year time period), rather than the more general statute regarding fraud or mistake (N.C.G.S. § 1-52(9), a three-year period), because the explicit language of the disputed deed of trust indicated it was a sealed instrument; between two possible statutes, the specific controls over the general. **Nationstar Mortg., LLC v. Dean**, 375.

Sewer rehabilitation project—nullum tempus doctrine—proprietary versus governmental function—In a dispute between a town and contractors over a sewer rehabilitation project, the trial court did not err in granting summary judgment in favor of defendant contractors on the basis that all of the claims, including negligence, breach of contract, and unfair and deceptive trade practices, were barred by the relevant statutes of limitations since the town waited over four years to bring

STATUTES OF LIMITATION AND REPOSE—Continued

suit. Since the operation and maintenance of a sewer system is a proprietary function, and not a governmental one, the doctrine of nullum tempus did not operate to exempt the municipality from the running of time limitations. **Town of Littleton v. Layne Heavy Civil, Inc., 88.**

SURETIES

Motion to set aside bond forfeiture—amendment—outside of statutory motion period—In a proceeding to set aside a bond forfeiture, the trial court did not err in allowing a surety to amend its motion by attaching the order to arrest defendant, even though the statutory 150-day period had expired, because the rules of civil procedure authorize trial courts to use their discretion to liberally allow pleading amendments, and the opposing party failed to show how allowing the amendment to include undisputed facts would cause material prejudice. **State v. Isaacs, 696.**

Motion to set aside bond forfeiture—judicial notice—material not attached to motion—In a proceeding to set aside a bond forfeiture, the trial court did not abuse its discretion by taking judicial notice of the order to arrest defendant even though the surety failed to attach the order to its motion, because the arrest order was beyond reasonable controversy and part of the history of the case. **State v. Isaacs, 696.**

TERMINATION OF PARENTAL RIGHTS

Grounds for termination—failure to legitimate—required statutory findings of fact—The trial court erred by concluding that grounds existed to terminate a father's parental rights to his daughter on the ground of failure to legitimate where the trial court failed to make the required findings of fact as to each of the five subsections in N.C.G.S. § 7B-1111(a)(5). **In re J.M.K., 163.**

Grounds for termination—failure to pay child support—existence of child support order—The trial court erred by concluding that grounds existed to terminate a father's parental rights to his daughter on the ground of failure to pay child support where there was no evidence that he had any court-ordered obligation to pay child support. **In re J.M.K., 163.**

No-merit brief—no issues on appeal—independent review—Where the father's counsel in a termination of parental rights case filed a no-merit brief pursuant to Rule of Appellate Procedure 3.1(d) and the father did not file a pro se brief, the Court of Appeals was bound by its decision in *In re L.V.*, 260 N.C. App. 201 (2018), to dismiss the appeal without conducting an independent review of the record, because the father failed to argue or preserve any issues for review. **In re L.E.M., 645.**

No-merit brief—no issues on appeal—independent review—Where the father's counsel in a termination of parental rights case filed a no-merit brief pursuant to Rule of Appellate Procedure 3.1(d) and the father did not file a pro se brief, the Court of Appeals was bound by its decision in *In re L.V.*, 260 N.C. App. 201 (2018), to dismiss the appeal without conducting an independent review of the record, because the father failed to properly bring forth any pro se argument. **In re I.P., 638.**

Petition—failure to allege ground—basis for termination—The trial court erred by concluding that grounds existed to terminate a father's parental rights to his daughter on the ground of abandonment where the termination petition did not allege that ground and thus did not put the father on notice of that ground as a potential basis for termination. **In re J.M.K., 163.**

TORT CLAIMS ACT

Bars to recovery—contributory negligence—falling in uncovered storm drain—Where plaintiff was injured falling into an uncovered storm drain and brought a negligence claim against the N.C. Department of Transportation under the Tort Claims Act, her claim was barred by her own contributory negligence in deviating from an intended pedestrian crosswalk path onto a grassy median and failing to keep a proper lookout. **Khatib v. N.C. Dep't of Transp.**, 168.

TORTS, OTHER

Bad faith—insurance carrier—refusal to pay claim—Plaintiff failed to state a claim for bad faith against his employer's insurance carrier because he did not allege that the carrier refused to pay his valid worker's compensation claim. **Seguro-Suarez v. Key Risk Ins. Co.**, 200.

UNFAIR TRADE PRACTICES

Privity of contract—insurance company of adverse party—third party an intended beneficiary of insurance contract—Plaintiff's claim for unfair and deceptive trade practices (UDTP) was not barred for lack of privity of contract where defendant insurance carrier was already obligated to pay him his workers' compensation benefits at the time it committed tortious conduct by initiating a malicious prosecution against him. The rule that a third-party claimant has no cause of action against the insurance company of an adverse party for UDTP does not apply to employees who are, pursuant to statute, the intended beneficiaries of their employers' compulsory insurance policies. **Seguro-Suarez v. Key Risk Ins. Co.**, 200.

UNJUST ENRICHMENT

Proper basis—benefit conferred—Plaintiff failed to state a claim that her deceased brother's sister-in-law (defendant) was unjustly enriched when she was deeded the brother's condominium and then inherited the brother's house upon his death despite an apparent oral agreement that plaintiff would receive the house. Plaintiff failed to make the necessary showing that she conferred a benefit on defendant since she did not own the house or otherwise have any legal right to it. **Barrett v. Coston**, 311.

ZONING

Extraterritorial jurisdiction—conflicting legislative action—The trial court properly entered summary judgment for plaintiff (Pinebluff) and issued a writ of mandamus ordering defendant (Moore County) to adopt a resolution authorizing Pinebluff's exercise of its extraterritorial jurisdiction. The case arose from a conflict between a law of general application, N.C.G.S. § 160A-360, and a local act, Session Law 1999-35, which abrogated the requirement of county approval. If reading a statutory scheme as a whole produces an irreconcilable conflict, the most recent provision should control and the session law was the most recent enactment. **Town of Pinebluff v. Moore Cty.**, 747.

